

Mental Injury Occasioned by Harm to Another: A Feminist Critique

Elizabeth Handsley*

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* B.A., LL.B. (U.N.S.W.), LL.M. (Northwestern), Lecturer in Law, Murdoch University, Perth, Western Australia. I owe a debt of gratitude to the providers of the Carl McGowan Fellowship at Northwestern University School of Law, for their generosity enabled me to complete this work in far more comfortable circumstances than I would otherwise have been able to provide for myself. I am also indebted to Professor Cynthia Grant Bowman and Professor Marshall S. Shapo of Northwestern University School of Law for their guidance when this paper was in its early stages, and to the numerous people who have been in attendance when I have presented oral versions of this paper, for their helpful comments. Thanks also to Ann Hale and to Paula Langley for helping me to put the finishing touches on the article.

The editors and I have decided to retain the Anglo-Australian spelling of words that are spelled differently in the United States. We have taken the view that because the power of U.S. culture is threatening the distinctiveness of Australian culture, we are justified in preferring my own "native" tongue. Changes have been made, however, where a difference in usage would make the article unintelligible to a U.S. reader.

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Introduction

This article was inspired by the challenge laid down by Leslie Bender in her 1988 article, *A Lawyer's Primer on Feminist Theory and Tort*,¹ to consider the many ways in which the power historically wielded by men has shaped our legal system, specifically in its treatment of tortiously-inflicted harm.² Bender's work applied feminist theory to the law of torts and found that the beliefs or attitudes on which the law is based, and which appear to be value-free and gender neutral, are in fact deeply biased and represent only one point of view. In particular, the law contains implicit male norms, which place the male and the masculine at the centre of law's world view and marginalize the female and the feminine. Thus the law generally expects and rewards "reasonableness"—a trait culturally associated with men—and fails to require us to be consciously caring and responsible towards each other—traits culturally associated with women.³ Bender's most impressive point, in

1. Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3, 37 (1988).

2. For a compendious summary of work in the area of feminist theory and tort, see Leslie Bender, *An Overview of Feminist Torts Scholarship*, 78 CORNELL L. REV. 575 (1993). One writer's work in particular is very closely related to mine, and her article could almost be considered a companion piece to this. See Deborah K. Hepler, *Providing Creative Remedies to Bystander Emotional Distress Victims: A Feminist Perspective*, 14 N. ILL. U. L. REV. 71 (1994).

3. See *infra* parts IV.A-B.

my view, relates to the general rule that one cannot sue a "stranger" for failure to come to one's rescue.⁴ Applying an ethic of care and responsibility, rather than reasonableness, Bender argues that the interest of the "stranger" in autonomy is less important than the interest of the would-be plaintiff in life and health. Bender makes the further telling point that the would-be plaintiff is bound to have relationships with other people, who indirectly will be harmed by that person's injury or death. Thus we might expect that a system of tort law which had been developed by women and with traditionally feminine concerns in mind would impose a duty to rescue, not just for the benefit of the would-be plaintiff, but for the benefit of the whole community.

This article develops some of these ideas in relation to another area of tort law,⁵ namely that which deals with mental injury—otherwise commonly known as "nervous shock" or "emotional distress."⁶ The particular focus of this article is psychic, emotional, or psychiatric disability (sometimes with physical consequences) suffered as a result of the death of, or of a physical injury to, another person. In the vast majority of cases, some sort of strong emotional tie, either of blood or marriage, binds the plaintiff and the physically injured person.⁷ An especially common scenario is mental injury arising out of the death of, or serious injury to, a son or daughter. It is for this reason that it will be argued that these injuries should be treated as the consequence of the disruption of relationships—something which the law has, by and large, failed to do. Rather, the law appears to have assumed that people's connections with others are unimportant, and it has developed and applied re-

4. See Bender, *supra* note 1, at 33-36 (discussing "no duty" cases).

5. A very useful complement to my analysis is provided in Hepler, *supra* note 2, at 78-87.

6. The former expression is current in Britain and Australia, the latter in the United States. It is interesting to note the different connotations raised by the two terms: "nervous shock" sounds more serious and permanent than "emotional distress." This is perhaps a very good lesson in the importance of naming and terminology, considering that recovery is generally much more limited in the jurisdiction that employs the less serious-sounding term. At the same time, "nervous shock" raises connotations of neurosis, thus presenting plaintiffs in an unsympathetic light from the very start. It is also a medical misnomer, and the terminology "has led to breakdown in communication between Medicine and the Law on the subject." John Havard, *Reasonable Foresight of Nervous Shock*, 19 MOD. L. REV. 478, 478 (1956). I prefer "mental injury" because it reflects the fact that this is indeed an injury, and one to be taken seriously.

7. I will resist calling this person the "primary accident victim," as courts and commentators are wont to do, because this leads to conceptual difficulties. Of course, the third person is the "primary victim" in the sense that his or her injury will usually precede the mental injury chronologically. However, it is my purpose to argue that this type of injury is best understood as caused by a breach of a duty owed directly to the plaintiff; the popular terminology obscures this.

strictive recovery rules accordingly. For example, the law has often privileged people who, in a situation of danger, fear only for themselves, over people whose primary concern is the safety of others.⁸ This article develops the argument that this response reflects a fundamentally masculine world view.

Obviously, women are not the only people who suffer mental injury as a result of witnessing the death or injury of another person, but mental injury appears to affect women more often than men. A brief survey of the cases in this area reveals that the vast majority of plaintiffs are women.⁹ This overrepresentation can be partly explained by the fact that women are more likely to be the primary caretakers of children, and are therefore more likely to be present when a child is injured or killed. However, presence at the scene of the accident is not necessary to produce mental injury, and so attention must be paid to a more fundamental explanation for women's overrepresentation. My argument is that it is the culturally feminine¹⁰ world view and attitude toward relationships which provides this explanation. Quite simply, disruption to relationships, and harm to loved ones, can be expected in this society¹¹ to affect women more deeply than men. Women are conditioned and expected to invest more in relationships with others, and thus to lose more when relationships are brought abruptly and violently to an end.

It will have become clear by now that much of the argument in this article is based on a notion of sexual difference. This notion, it is acknowledged, can be quite controversial both within and outside of feminist discourse. I will therefore explain here the types of differences on which my analysis relies, and what I think the broader ramifications of those differences are. As noted above, it is expected in our society that relationships with others are of greater impor-

8. See *infra* note 44 and accompanying text.

9. See Martha Chamallas & Linda Kerber, *Women, Mothers and the Law of Frigate: A History*, 88 MICH. L. REV. 814, 814, 844-49 (1990).

10. My use of the terms "masculine" and "feminine" is intended to describe attributes that appear to belong predominantly to one sex or the other, rather than any essential sexual difference. This is consistent with my refusal to make any claims about the origins of gender differences, while still allowing that there is masculine and feminine in all of us. Thus, "masculine values" are those commonly associated with men, though any given woman may hold them, and a "feminine injury" is one that affects a side of one's existence which is commonly identified with or encouraged in women, though any given man may suffer it. Thus, whenever I use the term "masculine" or "feminine," I should be understood as referring predominantly to cultural rather than biological attributes.

11. When I say "our society," I mean Anglo-dominated Western society. I cannot presume to speak for other parts of Western society of which I have little experience, but my assessment of the United Kingdom, the United States of America, and Australia is based on long exposure to their culture and traditions.

tance to women than to our male counterparts, and that we are more emotionally vulnerable than men.¹² These characteristics form an important part of the gender script for female humans in our society, and because of the sanctions attached to failure to follow the script, the script in the vast bulk of cases becomes a self-fulfilling prophecy—that is, the prescribed difference becomes an observable and experienced reality.

A question people commonly raise in the context of gender difference is whether the difference is innate or learned. Feminists generally argue that it is learned; others are inclined to insist that it is innate and therefore it is a waste of time to resist or analyze it. For the purposes of this paper, however, the origin of the observable and experienced difference is beside the point. A lawsuit is no place to be attempting to distinguish nature from nurture. The people (mainly women) who are plaintiffs in a mental injury case simply are who they are, and whether any (relative) predisposition they might have had was a result of hormones or conditioning, they should not be penalized for it. If this aspect of sex difference is innate, such a penalty amounts to setting men up as the standard by which others are judged. If, on the other hand, the premium that women tend to place on relationships is learned, we are confronted with a double standard whereby society values women for caring and connection, teaching and encouraging us to display those qualities, and abandons us when faced with the sometimes disastrous consequences. The real point is that if women are particularly vulnerable to mental injury, we are that way as a group, and the traits that identify the group should not be treated as individual idiosyncracies that are in the control of each person.

The law has now been responding to compensation claims for mental injury for some time. Discussion by courts and commentators has at times revealed a deep distrust of such injuries. Arguments have been advanced about the danger of a flood of fraudulent and/or trivial claims, or simply a flood of claims, and of liability that would exceed culpability. Courts have developed, and commentators have proposed, a number of mechanical rules in an attempt to address these concerns. I will argue that none of these rules is satisfactory, for both doctrinal reasons and reasons of principle. Part I of this article provides a brief overview of the various rules which have been, and in some cases continue to be, applied in mental injury cases. Part II explains some inconsistencies between general

12. See generally CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (1982). The work of Gilligan and other feminist theorists will be discussed in greater length at Part IV.

principles of tort law and the various approaches taken to mental injury.

Finally, Parts III and IV argue that the lack of any real coherence in the law relating to mental injury belies a deeper and possibly unconscious bias against the female and the feminine. The mental injury rules developed by courts perpetuate culturally masculine values in relation to what is essentially a feminine injury.¹³ Some of the rules are redolent of the Cartesian mind-body split, a notion which has always had a tendency to treat women as second-class human beings.¹⁴ Some of the rules are predicated on the notion that people identify themselves, or should identify themselves, primarily as individuals, in the mold of classical liberal atomism.¹⁵ This once again is a notion that tends to describe men's experience more accurately than women's, and so treats women as in some sense abnormal. And some of the rules perpetuate implicit male norms, in one or more of three ways: by tending to value "economic" losses over losses sounding in the emotions or in relationships, by defining "reasonableness" in such a way as to describe a world view that can be identified as masculine, or by rewarding masculine activities like heroism while marginalizing characteristics that are more culturally feminine, such as caring and connection with others.¹⁶ All of this amounts, I argue, to a double standard, where society values women for being caring and concerned with connection, and treats women who suffer injury as a result of that concern as somehow abnormal and undeserving.¹⁷ In this way, I develop in this article a picture of the law relating to mental injury as firmly entrenched in the values and culture of patriarchy.

I. The Historical Development of the Law of Mental Injury

It is impossible to understand the law's present response to mental injury occasioned by the death of or by injury to a third person without surveying the historical treatment of non-physical in-

13. An example of the sense in which mental injury is "feminine" according to our everyday understandings is in the House of Lords decision of *Page v. Smith*, where Lord Jauncey of Tullichettle uses "a woman prone to hysteria" as his example of a person particularly susceptible to mental injury. [1995] 2 All E.R. 736, 749 (appeal taken from Eng. C.A.). The introduction of a gendered image was quite unnecessary here, and in my view illustrates the tendency of judges and commentators consciously or unconsciously to treat the injury as one belonging to women as a gender.

14. See *infra* part IV.A.

15. See *infra* part IV.B.

16. See *infra* part IV.C.

17. See *infra* part IV.D.

jury. There are a number of ways such injury may arise. Many of the older cases involved shock or fright to a plaintiff who was placed in physical danger but not actually touched by the defendant. Such cases form the pedigree for present legal doctrine.

The law has treated these injuries in a number of ways. The general trend has been towards liberalization of recovery rules, but there remain serious restrictions. In the earliest cases, mental injury was simply not recognized as sounding in damages.¹⁸ Even once mental injury was recognized, around the turn of the century, as legally cognizable, two rules (each of which is still applied in some United States jurisdictions) have perpetuated the burden on plaintiffs to prove the breach of a duty in respect of physical integrity. The first, again from around the turn of the century, requires plaintiffs to have suffered some kind of physical impact in the course of events leading up to their mental injury. This is commonly known as the "impact rule."¹⁹ The second rule, again developed as early as the turn of the century, but mainly since the early 1960s, requires that the defendant's actions should have physically endangered the plaintiff. This rule is commonly referred to as the "zone of danger rule."²⁰ Finally, since 1968, some United States jurisdictions have recognized a duty towards people who were not touched or endangered in the accident, provided that certain other criteria were met. This approach is commonly named after the California case that originated it, *Dillon v. Legg*.²¹ Apart from an exception for "direct victim[s] of the assertedly negligent act,"²² the *Dillon* approach appears to be the "state of the art" in recovery for mental injury in the United States. The approach introduced in the 1984 Australian case of *Jaensch v. Coffey*²³ represents an even greater liberality in recognizing mental injury claims than the *Dillon* approach, but still contains limitations as compared with the approach to other kinds of injury.

It appears that there have been significant advances in the law—informed and inspired, no doubt, by advances in medical science—in the willingness to recognize mental injury as serious and debilitating and worthy of the tort system's attention. However, there remain fairly substantial limitations on recovery throughout the United States, Australia, and the United Kingdom. In most ju-

18. See discussion *infra* part I.A.

19. See discussion *infra* part I.B.

20. See discussion *infra* part I.C.

21. 441 P.2d 911 (Cal. 1968). See discussion *infra* part I.D.

22. *Molien v. Kaiser Found. Hosp.*, 616 P.2d 813, 816 (Cal. 1980). See *infra* text accompanying notes 69-78.

23. 155 C.L.R. 549 (Austl. 1984). See *infra* text accompanying notes 86-103.

risdictions, mental injury plaintiffs are required to show that their injury is a psychiatrically diagnosable disease; in some, they are required to show that their injury is one of a particular severity.²⁴ Some jurisdictions allow only plaintiffs who were within a certain distance of the accident to recover; some allow only plaintiffs who learned of the accident within a certain time of its occurrence to recover.²⁵ Some require plaintiffs to have physically witnessed the accident; others extend recovery to plaintiffs who witnessed the aftermath of the accident, for example at the hospital.²⁶ Plaintiffs who are injured by the strain of caring for the physically injured person after the accident cannot recover.²⁷ Many jurisdictions impose a requirement that the defendant must be liable also to the physically injured person,²⁸ which can pose significant problems in cases of contributory negligence by the physically injured person. And finally, there are indications that mental injury arising out of what in many courts' opinions amounts to "irrational guilt feelings"—that is, where a plaintiff blames herself for the physical injury to the other person, even though it is not her fault—is not recoverable.²⁹ All of these restrictions indicate that we are still a long way from the situation where mental injury is treated as on a par with physical injury.

A. *Damage Not Recognized*

Initially, mental harm was simply non-harm.³⁰ It was regarded as transient or trivial, and simply not something on which courts should waste time. This attitude can partly be explained by the state of medical knowledge in the nineteenth century and earlier, when lack of understanding about the workings of the human mind consigned depression, anxiety, and neurosis to the same category as "mere" grief, sorrow, or upset. Since "the law is not concerned with trifles,"³¹ such injury could not form the basis for an action. Another argument advanced was that such damages were

24. See *infra* part I.E.1.

25. See *infra* part I.E.2.

26. See *infra* part I.E.3.

27. See *infra* part I.E.4.

28. See *infra* part I.E.5.

29. See *infra* part I.E.6.

30. "Historically, the purpose of the tort law has been to compensate innocent persons for their *economic* losses inflicted by the carelessness of others." Ballinger v. Palm Springs Aerial Tramway, 269 Cal. Rptr. 583, 590 (Ct. App. 1990) (McDaniel, J., dissenting) (emphasis added). See also Monteleone v. Coop. Transit Co., 36 S.E.2d 475, 480 (W. Va. 1945); Harold F. McNiece, *Psychic Injury and Tort Liability in New York*, 24 ST. JOHN'S L. REV. 1, 9 (1949).

31. From the maxim "*de minimus non curat lex*." There were also concerns about the difficulty of proving the existence of such injury.

essentially vindictive or punitive—an attitude which could perhaps be seen as a precursor to present concerns about disproportionality between liability and culpability.³² However, damages for mental suffering have always been available where the plaintiff was also physically injured. Under the doctrine of “parasitic damages,” compensation for pain and suffering, no matter how great, has always been able to ride on the back of damages for physical injury.³³ The “parasitic damages” rule was a way of recognizing mental injury without increasing the pool of potential plaintiffs.³⁴ A plaintiff who suffered both physical and mental injury could sue, no matter how trivial the physical injury. However, a plaintiff who suffered only shock or fright could not sue, no matter how severe the mental injury.

B. *The Impact Rule*

The view that damages for non-physical injury were mere trifles, and hence not the concern of the law, was challenged by cases where a plaintiff suffered some physical consequences of his or her fright; a common example is the case of a pregnant woman suffering a miscarriage.³⁵ It is difficult to regard such an injury as trivial, so courts found other justifications for denying recovery, such as the danger of a flood of fabricated claims and the difficulty of proving factual causation.

The courts developed a rule, commonly referred to as the “impact rule,” which was thought to have the capacity to avoid the two main difficulties:³⁶ the plaintiff could recover so long as he or she

32. See *Blackwell v. Oser*, 436 So. 2d 1293, 1295 (La. Ct. App. 1983). The court later noted that it has been held that such damages are not “vindictive.” *Id.* at 1297. However, similar arguments have surfaced in the literature relatively recently. Richard Pearson argued in 1982 that plaintiffs should not be compensated for the “intangible harm” arising out of the loss of relatives because it is impossible to restore such plaintiffs to their pre-accident condition: “it is because the mother’s claim to our sympathy is so strong that money damages seem so inappropriate.” Richard N. Pearson, *Liability to Bystanders for Negligently Inflicted Emotional Harm: A Comment on the Nature of Arbitrary Rules*, 34 U. FLA. L. REV. 477, 502 (1982). Disproportionality between culpability and liability is discussed further in Part II.C.

33. See W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* § 54, at 362-65 (5th ed. 1984); JOHN A. FLEMING, *THE LAW OF TORTS* 145 (7th ed. 1987); Pearson, *supra* note 32, at 486.

34. It has been said that the “parasitic damages” rule also worked to discourage fraudulent claims. See Ethan Finneran, *The Death of the Ensuing Physical Injury Rule: Validating Claims for Negligent Infliction of Emotional Harm*, 10 HOFSTRA L. REV. 213, 218-19 n.28 (1981).

35. See, e.g., *Bourhill v. Young*, 1943 App. Cas. 92 (appeal taken from Scot.); *Reed v. Moore*, 319 P.2d 80 (Cal. Ct. App. 1957); *Pankrop v. Hinkley*, 123 N.W. 625 (Wis. 1909).

36. See, e.g., *Lejeune v. Rayne Branch Hosp.*, 556 So. 2d 559, 563 (La. 1990); see also Alvan Brody, *Negligently Inflicted Psychic Injuries: A Return to Reason*, 7 VILL.

had been touched in some way in the course of the events that produced the shock. Thus, in a case where the plaintiff was frightened by the defendant's charging horses, which came so close to her that she was standing between their heads when they stopped, recovery was denied.³⁷ In other cases, successful plaintiffs based their claims on smoke inhalation³⁸ or dust in the eye.³⁹ Thus, "some courts stretched the concepts of physical injury and physical impact" where "justice seemed to call for compensation."⁴⁰

C. The Zone of Danger Rule

By the end of the first half of this century, most courts were willing, probably as a result of advances in medical science, to accept that extreme fright could have physical consequences.⁴¹ However, this recognition led to another problem: was mental integrity

L. REV. 232, 233-35 (1961-62); Jonathan K. Golden, *The Development of Recovery for Negligently Inflicted Mental Distress Arising from Peril or Injury to Another: An Analysis of the American and Australian Approaches*, 26 EMORY L.J. 647, 649 (1977); Comment, *Negligently Inflicted Mental Distress: The Case for an Independent Tort*, 59 GEO. L.J. 1237, 1239-40 (1971) [hereinafter *Negligently Inflicted Mental Distress*]. For general rejections of this type of reasoning, see Niederman v. Brodsky, 261 A.2d 84, 86-89 (Pa. 1970); Brody, *supra*, at 243 (stating that "as a problem of causation . . . the mental anguish of the onlooker does not depend upon whether he is physically injured by the same force which imperils or harms the victim").

Some have interpreted the impact rule as the corollary of the proposition that there can be no recovery for mere fright. So, the argument goes, there cannot be recovery for the consequences of fright. See McNiece, *supra* note 30, at 25-27 ("Actually, of course, the fright is proved merely in an effort to show the chain of causation." (citing Mitchell v. Rochester Ry., 45 N.E. 354, 355 (N.Y. 1896))).

37. Mitchell v. Rochester Ry., 45 N.E. 354 (N.Y. 1896).

38. Morton v. Stack, 170 N.E. 869 (Ohio 1930), discussed in KEETON ET AL., *supra* note 33, at 364.

39. Porter v. Delaware Lackawanna Western R.R., 63 A. 860 (N.J. 1906), discussed in KEETON ET AL., *supra* note 33, at 364.

The Supreme Court of Illinois noted in Rickey v. Chicago Transit Auth., 457 N.E.2d 1 (Ill. 1983), that recovery in this type of case was a major reason for the rule's "loss of adherents." *Id.* at 4. See also McNiece, *supra* note 30, at 28 (pointing out that such cases make a mockery of the argument from proximate cause which supposedly supports the impact rule); Pearson, *supra* note 32, at 487-88 (arguing that the problem with the impact rule is that it confuses liability and damages, "[t]he discontinuity between the damages rule recognising fright as an appropriate element of harm and the liability rule limiting recovery to cases involving impact would inevitably doom the rule").

40. Bowen v. Lumbermens Mut. Casualty Co., 517 N.W.2d 432, 437 (Wis. 1994).

41. As one court recently explained:

The abandonment of the impact rule resulted from the appropriate recognition by courts of two related concepts: First that a negligent actor can produce mental trauma in another without physical impacts, and second, that advances in medical science permit the diagnosis of mental trauma with accuracy akin to that available for the diagnosis of physical trauma.

Asaro v. Cardinal Glennon Memorial Hosp., 799 S.W.2d 595, 598 (Mo. 1990). See generally Paul V. Calandrella, *Safe Haven for a Troubled Tort: A Return to the Zone*

now an independently protected interest? The United States courts' answer, by and large, was no; the rule encapsulating this response is generally known as the "zone of danger rule."⁴² Only plaintiffs who were themselves physically endangered (as well as frightened) by the defendant's negligence can recover.

Jurisdictions differ as to the exact operation of the zone of danger rule. In some, as long as the plaintiff was in fact in the zone of danger, he or she can recover, irrespective of whether he or she feared for him- or herself or for another person;⁴³ in others it seems that the plaintiff must testify that he or she *was* afraid for him- or herself.⁴⁴ We might call the former the "weak" version of the zone

of Danger for the Negligent Infliction of Emotional Distress, 26 SUFFOLK U. L. REV. 79 (1992).

42. See, e.g., *Rickey*, 457 N.E.2d 1; *Purcell v. St. Paul Ry.*, 50 N.W. 1034 (Minn. 1892); *Bass v. Nooney Co.*, 646 S.W.2d 765 (Mo. 1983); *Jelley v. LaFlame*, 238 A.2d 728 (N.H. 1968); *Bovsun v. Sanperi*, 461 N.E.2d 843 (N.Y. 1984); *Niederman v. Brodsky*, 261 A.2d 84 (Pa. 1970); *Johnson v. Rogers*, 763 P.2d 771, 785 (Utah 1988); *Savard v. Cody Chevrolet, Inc.*, 234 A.2d 656 (Vt. 1967). Although the zone of danger rule is commonly regarded as a uniquely American invention, a recent House of Lords decision adopts something similar in that it distinguishes between "bystanders" (who need to show that injury by nervous shock was foreseeable) and "participants" (who can rely on the foreseeability of physical injury to form the basis of a duty of care). See *Page v. Smith*, [1995] 2 All E.R. 736 (appeal taken from Eng. C.A.).

43. See, e.g., *Orlo v. Connecticut Co.*, 21 A.2d 402 (Conn. 1941); *Asaro*, 799 S.W.2d at 598; *Reed v. Cioffi, Seftel & Soni, P.C.*, 548 N.Y.S.2d 73 (App. Div. 1989); *Trombetta v. Conkling*, 593 N.Y.S.2d 670, 671 (App. Div. 1993). However, the court in *Asaro* later asserted that liability under the zone of danger rule is predicated on "reasonable fear of personal, physical injury," which would suggest that the test is both subjective and objective. 799 S.W.2d at 599. In *Bowman v. Williams*, 165 A.2d 182 (Md. 1933), the Court of Appeals of Maryland pointed out that fear is the same, whether it is "objective" or "subjective" and so "there is neither logic nor reason" in the distinction. 165 A.2d at 183. See also Stanley W. West, *Torts—Recovery for Physically Manifested Mental Distress—Towards a More Liberal Negligence Approach*, 10 WAKE FOREST L. REV. 187, 188 (1974) (calling this version of the zone of danger rule a "misnomer in that the damages awarded do not result from the plaintiff's presence in the 'zone of danger,' but rather are awarded for mental suffering which would have resulted irrespective of the exact position of the plaintiff").

In *D'Ambra v. United States*, 338 A.2d 524 (R.I. 1975), the zone of danger rule was defended on the basis that it "does reflect the core notion of some reasonable relation or nexus between the negligent conduct and the injury sued upon." *Id.* at 530. The court did not appear to see any significant difference between the zone of danger rule and the more permissive rules laid down in *Dillon v. Legg*, 441 P.2d 912 (Cal. 1968). See *infra* notes 60-62 and accompanying text; see also Chamallas & Kerber, *supra* note 9, at 821-22. Havard suggests that even if a plaintiff thinks that he or she feared for another person, the fear was probably in fact for him- or herself. Havard, *supra* note 6, at 482-83.

44. In *Amaya v. Home Ice, Fuel & Supply Co.*, 379 P.2d 513 (Cal. 1963), for example, the plaintiff had actually refused the opportunity to amend her statement of claim to say that she had feared for herself rather than for her son. Her claim was denied, and it appeared that the court assumed that the requirement was fear for oneself. *Id.* at 517-20. See also *Reed v. Moore*, 319 P.2d 80 (Cal. Ct. App. 1957) (holding that miscarriage which resulted from fright for one's own safety is compensable); *Strazza v. McKittrick*, 136 A.2d 149 (Conn. 1959) (allowing recovery to plain-

of danger rule and the latter the "strong" version.⁴⁵ The difficulties of the strong version were noted in the English case of *Hambrook v. Stokes Bros.*⁴⁶ The plaintiff's wife saw the defendant's runaway lorry careening towards a place where she knew her children were walking to school; upon hearing the news that a little girl had been hurt, the woman suffered nervous shock and a severe hemorrhage, as a result of which the fetus she was carrying was stillborn, and the woman herself died.⁴⁷ The plaintiff sued for his wife's wrongful death. The reason the facts of this case present a difficulty from the

tiff who feared for her own safety); *Williams v. Baker*, 572 A.2d 1062, 1064 (D.C. 1990) (barring recovery to mother for emotional distress caused by witnessing physician's negligent treatment of her child); *Rickey v. Chicago Transit Auth.*, 457 N.E.2d 1, 5 (Ill. 1983) (holding that a bystander in the zone of danger who had reasonable fear for her own safety has right of action for emotional distress); *Stadler v. Cross*, 295 N.W.2d 552, 553 (Minn. 1980) (denying recovery for bystanders not reasonably positioned to fear for their own safety); *Asaro*, 799 S.W.2d at 599 (Mo. 1990) (requiring fear for oneself which was both actual and reasonable); *Lancellotti v. Howard*, 547 N.Y.S.2d 654 (App. Div. 1989) (denying recovery to plaintiff whose erroneous pregnancy diagnosis did not result in fear for her own safety); *Waube v. Warrington*, 258 N.W. 497, 499 (Wis. 1935) (denying recovery to husband for wife's death which resulted from her witnessing the death of their child on the grounds that had she lived she would not have been allowed to recover damages); A.L. Goodhart, *Emotional Shock and the Unimaginative Taxicab Driver*, 69 L.Q. REV. 347, 348-49 (1953) (discussing the opinion of Hodson, L.J., in *King v. Phillips*, [1953] 2 W.L.R. 526); *Pearson*, *supra* note 32, at 490 (defending this version of the zone of danger rule on the basis that it maintains continuity between the damage recognized—fear for oneself—and the rule of liability); *Golden*, *supra* note 36, at 650 (discussing mental distress arising from peril or harm to self); *Negligently Inflicted Mental Distress*, *supra* note 36, at 1240-41, 1243 (discussing the requirement of fear for self in recoveries for mental distress). The Wisconsin Supreme Court explicitly rejected this aspect of the rule in *Bowen v. Lumbermens Mut. Casualty Co.*, 517 N.W.2d 432 (Wis. 1994).

Brody noted in 1962 that the zone of danger rule appeared to mean that, where the plaintiff feared both for him- or herself and for another person, damages would be apportioned between those attributable to the first and the second fear, and that the award would cover only the former. Brody, *supra* note 36, at 241-42. Somewhat paradoxically, the plaintiff would have full recovery under the impact rule, provided its other requirements were met. *Id.* Apportionment between injury arising from fear for self and fear for others was required in the English case of *Richard and Wife v. Plymouth Coop. Soc'y* (1903). See *Havard*, *supra* note 6, at 485-86.

45. For example, in *Klassa v. Milwaukee Gas Light Co.*, 77 N.W.2d 397 (Wis. 1956), the plaintiff and her children were in the basement of their home when employees of the defendant caused a fire there, but the plaintiff was in the laundry room and therefore separated from her children at the time of the fire. *Id.* at 400. The defendant argued that the plaintiff's shock and fright did not stem from the original fire but rather from learning that the children were in the basement. *Id.* at 402. Recovery was excluded unless the plaintiff could prove that she had feared for her own safety. *Id.* at 404. In *Strazza v. McKittrick*, the plaintiff heard a truck crash into the porch where she thought her child was waiting. 156 A.2d at 151. The Connecticut Supreme Court held that the plaintiff could recover for injuries stemming from fear for herself, but not for injuries stemming from fear for her child. *Id.* at 152. In both these cases, the plaintiff was in the zone of danger, but recovery was limited according to the state of the plaintiff's mind at the time of the accident.

46. *Hambrook v. Stokes Bros.* [1925] 1 K.B. 141 (Eng. C.A. 1924).

47. *Id.*

point of view of the strong version of the zone of danger rule is that the woman was arguably in the zone of danger herself, so the weak version of the zone of danger rule would not preclude her (or anyone claiming through her) from recovering. Under the strong version of the zone of danger rule, however, she would have to prove that her fear was actually for herself and not for her children.

It is entirely likely that the involvement of the mother-child relationship in the case was a significant factor in convincing the court of appeal to allow her husband's wrongful death claim, in spite of the fact that the woman did not necessarily fear for her own physical safety. Lord Justice Bankes, in a now rather famous statement, compared the "natural" feelings of a "courageous" mother, who is "devoted to her child" and fears only for the child, with the "non-natural" feelings of a woman who "is timid and lacking in the motherly instinct" and thinks only of herself.⁴⁸ Not surprisingly, Justice Bankes saw the former mother as more deserving and refused to fashion a rule which would deny her claim.⁴⁹ Thus, in essence, Bankes applied the weak version of the zone of danger rule. Bankes was willing to give legal recognition to the fear of a mother for the safety of her children, and thus to the kind of selflessness that makes the strong version seem harsh and unrealistic in a world where connections between people are important.

A later case supports this interpretation. In *Bourhill v. Young*⁵⁰ the House of Lords denied recovery to a woman who suffered a miscarriage as a result of witnessing the immediate aftermath of a fatal motorcycle accident. Because there was a tram between her and the motorcyclist at the time of the collision, she only heard the impact and later saw a pool of blood on the road.⁵¹

48. *Id.* at 151.

49. *Id.* at 151-52. As a feminist, one must feel ambivalent about this statement, though it is clear that the more acceptable result is reached. The simple fact is that most women do have special connections with their children, whose safety is likely to be at least as important to them as their own, and possibly more so. Lord Justice Bankes' statement recognises this significant reality, and yet passes judgment on women who do not conform to this standard. On the one hand, it is refreshing that Justice Bankes does not see the "maternal instinct" as an inevitable phenomenon, and on the other hand, it is discomforting that its absence is a reason for (albeit mild) censure. However, the important fact is that the censure is mild, and his Lordship does not hint that he would exclude the claim of the "timid" mother.

Havard comments on this passage in Bankes' judgment: "It would, in any case, be impossible to attribute the 'courageous' mother's damage to fear for her child, unless it was assumed that she was entirely lacking in the normal instinctive and automatic emotional reaction to an immediate threat to her own life: a proposition which is medically unsound and based largely on sentiment." Havard, *supra* note 6, at 489.

50. 1943 App. Cas. 92 (1942) (appeal taken from Scot.).

51. *Id.* at 101.

Unless the mother-child relationship was an exception to the zone of danger rule in England, it must be concluded that the weak version of the zone of danger rule remained in force: the tram between the plaintiff and the cyclist put the former out of the zone of danger. The witness simply could not reasonably have feared for herself.⁵²

The zone of danger rule was finally expressly rejected in England in 1982.⁵³ The rule is still in force in many jurisdictions of the United States, however, and courts have been much stricter in applying the rule.⁵⁴ Proponents of the rule believe that it guards against unlimited liability: a defendant can cause fear in many more people than he or she can physically endanger.⁵⁵

A comparison of the zone of danger rule and the impact rule shows that the essential difference between the two is that the zone of danger rule was a step towards recognizing a *duty of care* in respect of mental injury. The impact rule tied duty very closely to physical injury, and therefore individuals had a duty of care to avoid physical injury. Mental integrity was *not* a protected interest. The zone of danger rule, on the other hand, recognized that injury could arise out of fright without impact, and so moved away from insistence on physical injury.⁵⁶ In this sense, it is best understood as a precursor to a duty of care to avoid actions that would

52. Goodhart suggests that the foundation of the *Bourhill* decision was distrust of the plaintiff's assertion that her miscarriage was caused by the defendant's negligence, rather than any point of doctrine or principle. "[T]he distinction between foresight of physical injury and foresight of emotional shock was probably not in the minds of their Lordships as it was clear that the emotional shock could not reasonably be attributed to the motor-cyclist's negligence." Goodhart, *supra* note 44, at 348. Goodhart also suggests that *Hambrook* itself could be seen as abandoning the zone of danger rule, since it was not clear that the plaintiff there was in any danger herself. A.L. Goodhart, *The Shock Cases and Area of Risk*, 16 MOD. L. REV. 14, 18-19 (1953). This would appear to support Goodhart's theory about the basis of the decision in *Bourhill*. See *id.* at 20.

53. See *McLoughlin v. O'Brian* [1982] 2 W.L.R. 982, 983 (appeal taken from Eng. C.A.).

54. See, e.g., *Williams v. Baker*, 572 A.2d 1062 (D.C. 1990) (holding that mother could not recover for emotional distress caused by witnessing physician's negligent treatment of her child); *Stadler v. Cross*, 295 N.W.2d 552 (Minn. 1980) (denying recovery to parents who saw their child hit by a truck); *Asaro v. Cardinal Glennon Memorial Hosp.*, 799 S.W.2d 595 (Mo. 1990) (denying relief for mother's emotional distress caused by medical malpractice on her son); *Reed v. Cioffi, Seftel & Soni, P.C.*, 548 N.Y.S.2d 73 (App. Div. 1989); *Oresky v. Scharf*, 510 N.Y.S.2d 897 (App. Div. 1987) (denying recovery for emotional distress to daughters of a nursing home resident who disappeared from the home).

55. See *Tobin v. Grossman*, 249 N.E.2d 419, 423 (N.Y. 1969); Pearson, *supra* note 32, at 507; Comment, *Negligence and the Infliction of Emotional Harm: A Reappraisal of the Nervous Shock Cases*, 35 U. CHI. L. REV. 512, 512 n.2 (1968) [hereinafter *Negligence and Emotional Harm*]. However, even this understanding can be challenged. See *infra* text accompanying notes 186-89, 209-12.

56. It is on this basis that Pearson prefers the zone of danger rule to the impact rule: "the zone of danger rule neatly dovetails liability and damages" in the sense

inflict mental injury. Yet, as will be shown below, analysis of the zone of danger rule in relation to fundamental legal principles shows that the rule did not in fact recognize a duty of care in respect of mental injury.⁵⁷ Rather, recovery seems to be based on a theory somewhat akin to parasitic damages: a duty is owed in certain circumstances, depending mainly on the foreseeability of a certain type of damage (physical), but then damages are available for other kinds of injury arising from the same negligent act. Looking at it from a defendant's point of view, there is only a duty to avoid certain kinds of behaviour, and (theoretically) any behaviour that raises a risk only of mental injury is permissible, as long as there is no duty relating to that kind of injury. Of course, most negligence raises a risk of both types of injury, so in most cases the difference is academic, but this analysis highlights the extent to which physical injury remains the paradigm in the minds of courts applying the zone of danger rule.⁵⁸ What in essence has happened is that courts have extended liability without extending duty⁵⁹ because the defendant was in breach of a well-recognized duty owed to the plaintiff in respect of physical safety. There was no *behaviour* that previously had been permissible that became negligent as a result of the adoption of the rule.

D. A General Duty of Care in Respect of Mental Injury?

The first major break with the heavily restrictive rules described above in the United States came in 1968, when the Supreme Court of California decided *Dillon v. Legg*.⁶⁰ The facts of the case exposed the arbitrariness of the zone of danger rule. The

that it predicates liability on invasion of the protected interest, which is the interest in freedom from fear for oneself. Pearson, *supra* note 32, at 490.

57. See discussion *infra* part III.A.1.

58. As we shall see later, further liberalizations have left untouched the paradigm status of physical injury.

59. As much was explicitly recognized in *Asaro v. Cardinal Glennon Memorial Hosp.*, 799 S.W.2d 595, 599 (Mo. 1990) (stating that the zone of danger rule "permits recovery according to the defendant's already existing duty of care to the plaintiff"); see also *Williams v. Baker*, 572 A.2d 1062, 1065, 1072-73 (D.C. App. 1990) (adopting the zone of danger rule to impose liability for mental distress but refusing to recognize a duty of care to avoid causing such distress); *Tobin v. Grossman*, 249 N.E.2d 419, 421 (N.Y. 1969) (discussing the courts' expansion of tort concepts to include mental harm rather than the creation of an entirely new cause of action); *Waube v. Warrington*, 258 N.W. 497, 500-01 (Wis. 1935). It was on this basis that the rule commended itself to the Supreme Court of Massachusetts in *Dziokonski v. Babineau*, 380 N.E.2d 1295 (Mass. 1978), but the court ultimately extended liability in that case, noting that the rule "is an inadequate measure of the reasonable foreseeability of the possibility of physical injury resulting from a parent's anxiety arising from harm to his child." *Id.* at 1300.

60. 441 P.2d 912 (Cal. 1968).

plaintiff was outside the zone of danger because she was sitting on the porch of her home when her daughter was struck and killed by a negligent driver, yet the woman's other daughter was in the zone of danger because she was in the street with her sister at the time of the accident. The majority recognized this aspect of the case and commented:

[W]e can hardly justify relief to the sister for trauma which she suffered upon apprehension of the child's death and yet deny it to the mother merely because of a happenstance that the sister was some few yards closer to the accident. The instant case exposes the hopeless artificiality of the zone-of-danger rule.⁶¹

Rather than creating an exception to the zone of danger rule for Mrs. Dillon's mental injury arising from the death of her daughter, the majority approached the case on the basis that the central question was one of duty. Recognizing that mental injury is not so simple a problem as physical, the majority propounded the following guidelines to aid in resolving the duty question: (1) the plaintiff's proximity to the scene of the accident, (2) the plaintiff's sensory observation of the accident, and (3) the closeness of the relationship between the plaintiff and the third person.⁶² These three guidelines, all relating to what might loosely be termed proximity,

61. *Id.* at 915. See also *Sinn v. Burd*, 404 A.2d 672, 677 (Pa. 1979); John L. Diamond, *Dillon v. Legg Revisited: Toward a Unified Theory of Compensating Bystanders and Relatives for Intangible Injuries*, 35 HASTINGS L.J. 477, 481-83 (1984); *Negligence and Emotional Harm*, *supra* note 55, at 522-23; Anthony E. Creato, *One Step Beyond the Zone of Danger Limitation Upon Recovery for the Negligent Infliction of Mental Distress*, 43 TEMP. L.Q. 59, 59-60 (1969). The majority in *Dillon* went on to disapprove of all the previous rules, commenting that their "successive abandonment . . . exposes the weakness of artificial abstractions which bar recovery contrary to the general rules." 441 P.2d at 925. See also *Barnhill v. Davis*, 300 N.W.2d 104, 107 (Iowa 1981) (rejecting "the harshness and artificiality of the zone of physical danger test"). The zone of danger rule was, however, defended in *Asaro* on the ground that "[i]t is the nature of the common law process . . . for courts to establish rules. Criticism of a rule as being arbitrary is often no more than a rhetorical device employed by courts to justify rejection of that rule." *Asaro*, 799 S.W.2d at 599.

62. *Dillon*, 441 P.2d at 920-921. Other courts have adopted similar approaches. See, e.g., *Mattingly v. Sheldon Jackson College*, 743 P.2d 356 (Alaska 1987); *Barnhill*, 300 N.W.2d 104; *Lejeune v. Rayne Branch Hosp.*, 556 So. 2d 559 (La. 1990); *Culbert v. Sampson's Supermarkets*, 444 A.2d 433 (Me. 1982); *Dziokonski*, 380 N.E.2d 1295; *James v. Lieb*, 375 N.W.2d 109 (Neb. 1985); *State v. Eaton*, 710 P.2d 1370 (Nev. 1985); *Corso v. Merrill*, 406 A.2d 300 (N.H. 1979); *Portee v. Jaffee*, 417 A.2d 521 (N.J. 1980); *Ramirez v. Armstrong*, 673 P.2d 822 (N.M. 1983); *Bovsun v. Sanperi*, 461 N.E.2d 843 (N.Y. 1984) (allowing recovery for mental distress only if the physically injured person is a close relative of the plaintiff); *Paugh v. Hanks*, 451 N.E.2d 759 (Ohio 1983); *Sinn*, 404 A.2d 672; *D'Ambra v. United States*, 338 A.2d 524 (R.I. 1975); *Kinard v. Augusta Sash & Door Co.*, 336 S.E.2d 465 (S.C. 1985); *Landreth v. Reed*, 570 S.W.2d 486 (Tex. Civ. App. 1978); *Hunsley v. Giard*, 553 P.2d 1096 (Wash. 1976); *Heldreth v. Marrs*, 425 S.E.2d 157 (W. Va. 1992); *Bowen v. Lumbermens Mut. Casualty Co.*, 517 N.W.2d 432 (Wis. 1994).

were thought to have the capacity to assist future courts in determining the foreseeability of this type of injury in any given case.

Justice Traynor, dissenting, criticized the guidelines on the basis that they did not clearly indicate the correct resolution of a case, being all matters of degree: "Upon analysis . . . their seeming certainty evaporates into arbitrariness, an [sic] inexplicable distinctions appear."⁶³ Other commentators, by contrast, have criticized later California courts for treating the *Dillon* criteria as hard and fast rules, rather than the flexible guidelines they were intended to be.⁶⁴

The real breakthrough of *Dillon* was its recognition of the foreseeability of mental injury occasioned by harm to another: that others will be shocked upon witnessing injury to a third person is within the foresight of the reasonable man.⁶⁵ The majority saw as foreseeable not only the injury, but also the plaintiff: "Surely the negligent driver who causes the death of a young child may reasonably expect that the mother will be not far distant."⁶⁶ Thus, this statement of what the reasonable man will foresee in a mental in-

63. *Dillon*, 441 P.2d at 926. On the reaction of the House of Lords to the *Dillon* approach, see Harvey Teff, *Liability for Negligently Inflicted Nervous Shock*, 99 L.Q. Rev. 101, 108-11 (1983) (discussing McLoughlin v. O'Brien [1982] 2 W.L.R. 982). Henderson criticizes the majority's decision on the principle that the rule was not stated in sufficiently formal terms to provide an adequate "basis upon which to adjudicate future cases." James A. Henderson, Jr., *Expanding the Negligence Concept: Retreat from the Rule of Law*, 51 IND. L.J. 467, 518 (1976).

64. See Diamond, *supra* note 61, at 477-78 (suggesting that foreseeability, rather than proximity, was the basis for the decision in *Dillon* and arguing that the "result is feast or famine for the plaintiff depending on the fortuities of time, location, or characterization of the plaintiff as 'direct' or 'indirect'"); Richard S. Miller, *The Scope of Liability for Negligent Infliction of Emotional Distress: Making "The Punishment Fit the Crime,"* 1 U. HAW. L. REV. 1, 5 (1979); West, *supra* note 43, at 190. In *Paugh v. Hanks*, the Supreme Court of Ohio was at pains to stress that the similar criteria it was adopting were "by no means exclusive, and the mere failure of the plaintiff to satisfy all of them should not preclude an aggrieved party from recovery." 451 N.E.2d at 766. In another case, observations about subsequent treatment of the *Dillon* guidelines were used to support continued adherence to the zone of danger rule. See *Williams v. Baker*, 572 A.2d 1062, 1072 (D.C. 1990).

It has also been suggested that *Dillon* has been applied in an inconsistent way. See, e.g., *Asaro v. Cardinal Glennon Memorial Hosp.*, 799 S.W.2d 595, 598 (Mo. 1990); Pearson, *supra* note 32, at 491-92 (criticizing the *Dillon* approach on the basis that it is difficult to ascertain the content of the rule); Diamond, *supra* note 61, at 481-83 (discussing the inconsistencies in subsequent courts' interpretations of *Dillon*).

65. See West, *supra* note 43, at 187.

66. *Dillon*, 441 P.2d. at 921. Chamallas and Kerber note the importance to the outcome in *Dillon* of Justice Tobriner's deployment of "the gender of the plaintiff both to guarantee the genuineness of the injury suffered and to argue for the foreseeability of the injury." Chamallas & Kerber, *supra* note 9, at 857. Pearson comments, however, that the *Dillon* approach, insofar as it hinges on foreseeability, is just as arbitrary as the zone of danger rule. Pearson, *supra* note 32, at 478.

jury case brings the case in line with the classic statement in *Palsgraf v. Long Island Railroad*⁶⁷ that the test for a duty of care is foreseeability of injury. *Dillon* expanded the notion of what is foreseeable.

One should not be too quick to conclude, however, that in expanding the content of foreseeability, *Dillon* achieved its goal of bringing the law of mental injury into step with general tort principles. In fact, there are strong grounds for suggesting that even under the *Dillon* rule, mental injury occasioned by harm to another is still somewhat marginalized, and that "bystanders" are subjected to a burden considerably heavier than plaintiffs whose injury came about in other ways.

The test to determine whether *Dillon* in fact brought mental injury occasioned by harm to another into line with the general principles of tort law is whether it recognized a general duty in relation to that type of injury. The potential difference between *Dillon*'s three "proximity" criteria and "normal tort principles" lies in the degree of flexibility in the manner in which they are applied. To the extent that the criteria are intended to be *flexible guidelines* for foreseeability, the case will have recognized a general duty in relation to mental injury and thus brought the area into line with other areas of tort law. One can imagine the criteria withering away as a body of case law was built up, expressing a collective judgment about the plaintiffs and the injuries that are foreseeable. Once that process was complete, there would no longer be any superadded criteria beyond foreseeability.⁶⁸ On the other hand, if the "proximity"

67. 162 N.E. 99 (N.Y. 1928). This was a case where a woman standing on a train platform was injured by a scale that fell from a wall as a result of an explosion precipitated by the negligence of railroad employees in pushing some other passengers onto a train and dislodging a package which one of the passengers was carrying. *Id.* Recovery was denied on the basis that, although the employees were clearly negligent, no impact on the plaintiff was foreseeable and therefore no duty owed to her. *Id.* at 100-01. On the relationship between the zone of danger rule and the *Palsgraf* doctrine, see KEETON ET AL., *supra* note 33, at 365-66. A similar approach, albeit with a different result, was taken by one member of the English Court of Appeal in *King v. Phillips* [1953] 2 W.L.R. 526. There recovery was denied a plaintiff who had seen her child run over by a taxi from a window in a nearby building; Lord Justice Singleton held that her presence, and thus her witnessing of the accident, were simply unforeseeable. *Id.* at 531. See Goodhart, *supra* note 44, at 350.

On the other hand, it has been suggested that *Dillon* "altered the conventional *Palsgraf* doctrine . . . [T]he *Palsgraf* requirement that plaintiff sue only for wrongs personal to that plaintiff [was] no longer found determinative of the duty issue and was relegated to a secondary role." Golden, *supra* note 36, at 656-57 (footnote omitted).

68. It is well-known, of course, that foreseeability is not the only criterion of duty in negligence; additional limitations may be added for policy reasons. *But see* Bowen v. Lumbermens Mut. Casualty Co., 517 N.W.2d 432, 439 (Wis. 1994) (equating policy with legal cause rather than duty). Perhaps that is what the *Dillon* criteria really

criteria are hard and fast rules, one will still not be able to say that a duty is owed with respect to mental injury occasioned by harm to another. On this understanding, there is a duty only in relation to physical injury, but that duty, as the result of an exception and subject to special criteria, also may form the basis for recovery for mental injury. There is no general duty towards the loved ones of those a person puts at physical risk with one's negligence. This would mean that recovery for mental injury is exceptional and anomalous.

Thus, there are at least two possible interpretations of the aftermath of *Dillon*: the first is that mental injury occasioned by harm to another is now a fully accepted, legally recognized injury which, as a general principle, the reasonable man should foresee as a possible consequence of negligent behaviour. In other words, there is a duty owed with respect to it. The second interpretation is that recovery for mental injury is an anomalous and heavily circumscribed extension to recovery for physical injury. On this interpretation, there is no duty with respect to mental injury occasioned by harm to another.

Alternatively, it might be suggested that *Dillon* created a separate tort—something other than ordinary negligence—and subject to its own rules and limitations. A later decision suggests that this latter interpretation might be the correct one. In *Molien v. Kaiser Foundation Hospitals*⁶⁹ the plaintiff sued a doctor for negligently misdiagnosing his wife as suffering from syphilis.⁷⁰ The doctor, understandably, advised the wife to inform the plaintiff of her supposed disease because he too would need to be tested and possibly treated.⁷¹ The news led to suspicion and discord within the marriage, and its eventual breakup, leading the plaintiff to suffer from severe emotional distress.⁷²

The defendants attempted unsuccessfully to have the claim dismissed on the basis of the *Dillon* criteria, pointing to the fact that the plaintiff was not present at the scene of the misdiagnosis.⁷³

represent: a proposal for a way to limit claims in order to satisfy policy concerns. However, if policy concerns remain, it is difficult to understand why a court would undertake to bring the area of law into line with normal tort principles. One would expect that no court would make such an undertaking without first considering and rejecting, as a matter of law, policy reasons for disallowing claims. Therefore, the *Dillon* criteria must be based not on policy but on an attempt to preempt future inquiries as to what is foreseeable.

69. 616 P.2d 813 (Cal. 1980).

70. *Id.* at 814.

71. *Id.*

72. The misdiagnosis led the wife to suspect that her husband had been having an affair. *Id.* at 814-15.

73. *Molien*, 616 P.2d at 815-16.

The Supreme Court of California, however, allowed the plaintiff to recover damages for this emotional distress, and also for loss of consortium.⁷⁴ The Court held *Dillon* to be "apposite but not controlling,"⁷⁵ distinguishing it, except insofar as it required the application of a test of foreseeability, as opposed to mechanical tests, such as impact or the plaintiff's presence in the zone of danger.⁷⁶

Thus was born the theory of the "direct victim," which is something separate from the theory of "bystander recovery" on which *Dillon* was based. Unlike "bystanders," "direct victims" do have a duty owed to them in relation to mental injury—that is, mental injury is a "direct" consequence of the negligence, and the nature of the negligence was such that it was bound or highly likely to cause that sort of injury. Justice Mosk, with whom Chief Justice Bird and Justices Tobriner, Newman, Manuel and Richardson concurred, reasoned as follows:

It is easily predictable that an erroneous diagnosis of syphilis and its probable source would produce marital discord and resultant emotional distress to a married patient's spouse; Dr. Kilbridge's advice to Mrs. Molien to have her husband examined for the disease confirms that plaintiff was a foreseeable victim of the negligent diagnosis. . . . We thus agree with plaintiff that the alleged tortious conduct of defendant was directed to him as well as to his wife.⁷⁷

It is difficult to find fault with these observations; the connection between the patient and the plaintiff was certainly such that an erroneous diagnosis of a sexually transmitted disease would have a profound effect upon the latter.⁷⁸ However, it appears that

74. *Id.* at 821-23.

75. *Id.* at 815.

76. The court explained that "the significance of *Dillon* for the present action lies not in its delineation of guidelines . . . ; rather, we apply its general principle of foreseeability to the facts at hand" *Id.* at 816.

77. *Id.* at 817.

78. Other courts have allowed recovery using a similar analysis. See, e.g., *Marlene F. v. Affiliated Psychiatric Medical Clinic*, 770 P.2d 278 (Cal. 1989) (allowing mother to assert claim for emotional distress against family therapist who, while treating both mother and son, molested the child); *Newton v. Kaiser Hosp.*, 228 Cal. Rptr. 890 (Ct. App. 1986) (allowing recovery where plaintiffs' child was injured during childbirth by negligent obstetrician); *L.P. v. Oubre*, 547 So. 2d 1320 (La. Ct. App. 1989) (molestation of plaintiffs' sons by scoutmaster); *Skorlich v. East Jefferson General Hosp.*, 478 So. 2d 916 (La. Ct. App. 1985) (obstetric malpractice); *Blackwell v. Oser*, 436 So. 2d 1293 (La. Ct. App. 1983); *Holland v. St. Paul Mercury Ins. Co.*, 135 So. 2d 145 (La. Ct. App. 1961) (allowing recovery to parents for mental anguish after their son ate rat poison left by defendant's insured and insured was unable to provide information as to the type of poison); *Johnson v. Jamaica Hosp.*, 467 N.Y.S.2d 634 (App. Div. 1983) (plaintiff's baby disappeared from hospital nursery). For an example of a refusal to apply the direct victim analysis, see *Marchand v. Superior Court*, 246 Cal. Rptr. 531 (Ct. App. 1988). In *Marchand*, the plaintiff claimed that

since this case there have been two categories of "mental distress" cases in California: "direct victim" cases and "bystander recovery" cases.⁷⁹ We are left wondering what would have happened if, say, Mrs. Molien had been injured rather than misdiagnosed, and Mr. Molien had heard of it and suffered the same injury.⁸⁰ Would he be considered a "direct victim" under those circumstances?

It appears not; otherwise, we would have the anomalous situation where a person who was present at the scene of a third person's harm would still have to satisfy the *Dillon* criteria—which, as we have seen, are not applied as flexibly as their authors appear to have wished⁸¹—and one who was some distance away would not have to satisfy the *Dillon* criteria. The position of the plaintiff who was some distance away certainly would be contrary to the spirit of *Dillon*, and one cannot imagine the courts allowing a plaintiff that kind of freedom for that reason.⁸² Thus, "direct victim" cases must be identified by the nature of the negligence and/or the existence of a very close, perhaps contractual, relationship between the third person and the defendant, such as that of doctor and patient.⁸³

Returning to normal tort principles—that is, to the idea of foreseeability—*Molien* invites us to conclude that the mental injury arising out of a person's mistaken belief that his or her spouse has not been faithful is plainly foreseeable, whereas the foreseeability of mental injury arising out of a mother's learning of her child's death or serious injury depends on whether she was present at the scene of the injury-causing event. Alternatively, one could conclude that the mental injury of a bystander as a result of witnessing a horrific accident to another person may or may not be foreseeable, depend-

the defendant's medical malpractice on her daughter caused her serious emotional distress; the court distinguished this from other direct victim cases on the ground that the plaintiff's reproductive interests were not implicated. *Id.* at 537. *But see id.* at 551 (Carr, A.J., dissenting) (arguing that the plaintiff could be treated as a direct victim on the basis of a contractual relationship between herself and the defendant). *See also* *Allen v. Toten*, 218 Cal. Rptr. 725 (Ct. App. 1986) (holding that defendant police could not foresee emotional injury to wife when they brought her to a scene where her armed and suicidal husband was involved in a standoff with other police).

79. A similar distinction between "participants" and "bystanders" has also been recently observed in Great Britain. *See supra* note 42 (discussing *Page v. Smith*, [1995] 2 All E.R. 736).

80. *See, e.g., Maloney v. Conroy*, 438 A.2d 6 (Conn. 1980) (allowing no recovery to bystander in case of medical malpractice).

81. *See supra* text accompanying notes 62-64.

82. Pearson comments that "the [*Molien*] court's distinction between the facts of *Molien* and those of *Dillon* is analytically unsound." Pearson, *supra* note 32, at 515.

83. *See, e.g.,* the medical malpractice cases cited *supra* notes 54 and 59. It has been suggested that another rationale behind the direct victim cases is that the object of the plaintiff's concern "is one commonly regarded as worthy of emotional attachment." Finneran, *supra* note 34, at 231.

ing on what the relationship between the two people was. These examples make it clear that "direct victims" are treated as more or less on par with victims of physical injury, whereas "bystanders" are in a special category, are not subject to the normal principles of tort law, and are not owed a duty in relation to the injury they suffered. Once again, the conclusion is that there is no general duty towards the loved ones of the people one endangers physically through his or her negligent acts.

We can only conclude that, if *Dillon* ever had the potential for bringing the law relating to mental injury occasioned by harm to another in line with other tort law, *Molien* put any such hopes to rest.⁸⁴ In the eyes of the law, only certain types of negligence (like misdiagnosis of a sexually transmitted disease) by their nature create a risk of mental injury. Other types of negligence will be subjected to the added scrutiny of the *Dillon* criteria. A preferable approach would recognize that any negligence that creates a risk of physical injury to one person also creates a risk of mental injury to that person's loved ones. Under such an approach, everyone would be a "direct victim."⁸⁵

To illustrate the restrictions remaining after *Dillon*, it is interesting to compare the Australian case of *Jaensch v. Coffey*⁸⁶ in an attempt to develop a theory to solve duty problems in all difficult areas, including occupiers' liability, omissions, the liability of public authorities, pure economic loss, and negligent misstatement.⁸⁷ The typical approach of United States courts to mental injury has by and large been the introduction of special rules.⁸⁸ In *Jaensch*, on

84. In *Marchand v. Superior Court*, 246 Cal. Rptr. 531 (Ct. App. 1988), the court explicitly stated, relying on *Molien*, that the plaintiff's cause of action derived from that of the person who was physically injured, *id.* at 534, and on that basis denied recovery to parents as bystanders to medical malpractice on their child. *Id.* at 546. Thus, it has been commented that "even after *Dillon* it cannot be said that emotional tranquility is a truly protected interest." Finneran, *supra* note 34, at 221-22.

85. One reason that has been suggested for limiting recovery in the way just described is that it avoids double recovery—by the person suffering physical injury and the person suffering mental injury. Diamond, *supra* note 61, at 501. It has been suggested that it would be economically inefficient to allow this kind of recovery. See, e.g., Miller, *supra* note 64, at 21-23.

86. 155 C.L.R. 549 (Austl. 1984).

87. These areas are listed as "difficult" because courts have seen the need for special rules or special attention. The reasons for this vary: occupiers' liability has historically been quite complicated; liability of public authorities raises significant policy issues from a constitutional viewpoint; pure economic loss has traditionally been seen as raising a significant risk of floods of claims; and unlimited liability and negligent misstatement and omissions have not traditionally been recognized as actionable at law.

88. It will be argued later that all these rules either distort the concept of foreseeability or ignore its relevance. See discussion *infra* part III.A.

the other hand, Justice William Deane⁸⁹ of the High Court of Australia attempted to find a solution which could cover all of these problem areas, without falling back on mechanical rules.⁹⁰

In *Jaensch*, the plaintiff's husband was seriously injured in a motorcycle accident, shortly after which she saw him at the hospital.⁹¹ She had apparently had an unhappy childhood and only found contentment and stability through her relationship with him.⁹² Although the husband ultimately survived, the plaintiff entertained for some weeks the belief that he was going to die and suffered severe anxiety and depression, which in turn developed into gynaecological problems necessitating a hysterectomy.⁹³ She brought a successful "nervous shock" action against the driver who negligently injured her husband.

In *Jaensch*, Justice Deane postulated that the duty of care in negligence is not, and never has been, dependent only upon foreseeability. By this Deane did not mean simply that policy considerations may be taken into account to avoid a duty even once foreseeability is established.⁹⁴ The basis of his analysis was *proximity*, which is "a broad and flexible touchstone of circumstances in which the common law would admit the existence of a relevant duty of care to avoid reasonably foreseeable injury to another,"⁹⁵ and which, as Deane explained:

involves the notion of nearness or closeness and embraces physical proximity (in the sense of space [and] time) between the person or property of the plaintiff and the person or property of

89. It should be noted that *Jaensch* was decided by a five-judge panel, and that each of the other judges delivered a separate opinion allowing recovery on slightly different grounds. See *Jaensch*, 155 C.L.R. at 549. Justice Deane's decision is discussed here because the approach in that judgment was two years later adopted by all but one of the other judges on the court as applicable to all negligence cases. See *San Sebastian Proprietary Ltd. v. Minister Administering Env'tl. Planning & Assessment Act 1979*, 162 C.L.R. 340 (Austl. 1986).

90. For an example of the application of Justice Deane's analysis in the area of occupiers' liability, see *Australian Safeway Stores v. Zaluzna*, 162 C.L.R. 479 (Austl. 1987); in the area of omissions by statutory authorities, see *Council of the Shire of Sutherland v. Heyman*, 157 C.L.R. 424 (Austl. 1985); and in the area of negligent misstatement occasioning economic loss, see *San Sebastian Proprietary Ltd v. Minister Administering Env'tl. Planning & Assessment Act 1979*, 162 C.L.R. 340 (Austl. 1986).

91. 155 C.L.R. at 550.

92. *Id.* at 556.

93. *Id.* at 559.

94. Justice Deane did, however, suggest that "policy considerations . . . may well be relevant to [the] overriding proximity requirement." 155 C.L.R. at 590. Thus the proposition that the duty inquiry involves a second stage of considering policy reasons for excluding or limiting the scope of duty, based on *Anns v. Merton London Borough Council*, 1978 App. Cas. 728 (1977) (appeal taken from Eng. C.A.), was not rejected in the course of Justice Deane's opinion.

95. 155 C.L.R. at 584.

the defendant, circumstantial proximity such as an overriding relationship of employer and employee or of a professional man [sic] and his [sic] client and causal proximity in the sense of the closeness or directness of the relationship between the particular act or cause of action and the injury sustained. . . . The identity and relative importance of the considerations relevant to an issue of proximity will obviously vary in different classes of cases⁹⁶

Justice Deane rejected the zone of danger rule⁹⁷ and the 1939 holding in the Australian case *Chester v. Waverley Corp.*⁹⁸ where the High Court, in an opinion that could be described as insensitive to say the least, rejected on unforeseeability grounds the claim of a plaintiff who had suffered "nervous shock" on seeing her drowned son dragged from a ditch.⁹⁹ On this, Justice Deane commented:

It is simply out of accord with medical knowledge and human experience to deny that it is reasonably foreseeable that the shock suffered by a mother on seeing the body of her infant child, whom she was seeking, raised from the bottom of a water-filled trench might well be such as to cause psychoneurosis or mental illness.¹⁰⁰

Justice Deane likewise rejected the second of the *Dillon* criteria, commenting that a requirement that the plaintiff witness the actual accident does not appear to effect any consideration of foreseeability¹⁰¹ and noted that the most important explanation for mental injury is "the existence of a close, constructive and loving relationship" between the plaintiff and the third person.¹⁰² Because of that relationship and because the plaintiff's injury was

96. *Id.* at 584-85.

97. He noted that it had never been part of Australian law. *Id.* at 606.

98. 62 C.L.R. 1 (Austl. 1939).

99. The High Court stated:

A reasonable person would not foresee that the negligence of the defendants towards the child would 'so affect' a mother It is . . . not a common experience of mankind that the spectacle, even of the sudden and distressing death of a child, produces any consequence of more than a temporary nature in the case of bystanders or even close relatives who see the body after death has taken place.

62 C.L.R. at 10 (Latham, C.J.) (quoting language used in *In re Polemis and Furness, Withy & Co.*, [1921] 3 K.B. 561, 574, 579, and in *Donaghue v. Stevenson*, 1932 App. Cas. 562, 580 (appeal taken from Scot.)).

100. *Jaensch*, 155 C.L.R. at 590.

101. *Id.* at 591-92. The validity of claims arising out of witnessing the aftermath of an accident was also recognized in several U.S. courts. See, e.g., *Masaki v. General Motors Corp.*, 780 P.2d 566 (Haw. 1989) (allowing recovery to parents who witnessed the consequences of an accident that left their son paralyzed); *Landreth v. Reed*, 570 S.W.2d 486 (Tex. Ct. App. 1978) (allowing recovery to sister who witnessed the drowning death of a sibling); *Gates v. Richardson*, 719 P.2d 193, 199 (Wyo. 1986) (allowing claims brought by family members who observed immediate aftermath of child's bike accident where child suffered severe bodily injuries).

102. *Jaensch*, 155 C.L.R. at 600. Justice Deane was, however, willing to countenance the possibility of an action by an unrelated bystander. *Id.* at 606.

caused by witnessing the immediate aftermath of her husband's accident,¹⁰³ the proximity criterion was satisfied and the plaintiff recovered damages for her mental injury and its physical consequences.

One cannot help but note the marked similarities between this decision and that in *Dillon v. Legg*.¹⁰⁴ Both decisions concerned themselves with proximity considerations (though not precisely the same proximity considerations) and effected a substantial advance in recognition of this type of injury. Both attempted an answer to the duty question on the basis of general tort principles, and both recognized the importance of relationships. However, both left lingering restrictions that cannot really be justified on the basis of traditional tort principles.¹⁰⁵

The difference, however, is that some of the restrictions left behind by *Dillon* were unintended. Although the decision spelled out the proximity criteria to be applied, those criteria were only intended as flexible guidelines. *Jaensch*, on the other hand, was rather vague about the content of proximity, leaving the law to be developed in the usual way—that is, on a case-by-case basis and in reaction to the fact situations that come before the courts. There may be much that is unsatisfactory about this method of development, from the point of view of certainty in the law and the convenience of parties and litigants, but it has always been the way of the common law. The main point for present purposes, however, is that the traditional approach contrasts markedly with the approach in the United States, which has been to attempt to preempt foreseeability issues and give resolutions in advance. The approach in *Jaensch* serves to highlight the extent to which United States law, even in the most liberal jurisdictions, has treated mental injury occasioned by harm to another as marginal to the general run of negligence law.

A plaintiff who has suffered mental injury occasioned by harm to another, in California or another state following the *Dillon* approach, must satisfy the court that he or she (1) was present at the scene of the accident, or not far from it at the time; (2) heard or saw the events killing or causing physical injury to the third person; and (3) was in a close familial or marital relationship to the person who was killed or physically injured. If all of these elements are satisfied, the injury and the plaintiff are held to be foreseeable.¹⁰⁶ It is

103. The key was witnessing the accident, rather than simply being told of the accident or the stress of nursing him afterwards.

104. 441 P.2d 911 (Cal. 1968).

105. See *infra* part III.

106. See *supra* text accompanying note 62.

also possible, if there is a close relationship between the defendant and the third person, or where reproductive or very obviously relational interests are involved, for a plaintiff to show that it was clearly foreseeable that mental injury would ensue. This is commonly known as the theory of the "direct victim" and is to be contrasted with the "bystander" theory of *Dillon v. Legg*, suggesting that maybe "bystanders" suffering mental injury are not really foreseeable, but are nonetheless to be treated as an anomalous exception if they can satisfy all three of the criteria listed above. In Australia, on the other hand, *Jaensch v. Coffey* has ruled that mental injury occasioned by harm to another is in principle foreseeable and that "proximity" must be established, but does not lay down any particular guidelines as to which injuries and which plaintiffs are proximate in the relevant sense.¹⁰⁷ Proximity is to be established on a case-by-case basis, as with other types of injury. Thus, the Australian approach comes much closer to recognizing a general duty of care in relation to mental injury occasioned by harm to another.

E. Lingering Limitations

As noted above, there remain restrictions on recovery for mental injury occasioned by harm to another, even after that type of injury has been recognized (to a greater or lesser extent) as foreseeable and deserving of the tort system's attention. The *Dillon* decision, although a substantial advance on the previous approaches of the impact rule and the zone of danger in recognizing a cause of action for negligently inflicted mental injury, stops short of recognizing a duty of care to the loved ones of the people one endangers through negligent acts. The courts' limitations on the cause of action purport to relate to policy considerations having to do with limiting liability and methods of proof. I discuss here the limitations on recovery, in order to set the scene for my argument in Part II that such limitations are *not* really supported by these policy considerations.

1. The Type and Extent of Injury

All the jurisdictions under consideration here (the various states of the United States, Australia and the United Kingdom) retain some kind of requirement relating to the type and/or the extent of the injury the plaintiff must prove in order to be successful.¹⁰⁸

107. See *supra* text accompanying notes 94-102.

108. Other types of, or lesser, injuries will fall foul of what remains of the "no damage" rule. See *supra* part I.A.

These limitations show that the law in most United States jurisdictions does not legally protect mental integrity. Even limitations relating to the extent of the injury, rather than its nature, evidence a treatment of mental injury that would be inconceivable in relation to other legally-protected interests.

The "physical manifestation requirement," which still applies in most United States jurisdictions,¹⁰⁹ is a limitation relating to the *type* of injury. It means that in order to recover for mental injury, a plaintiff must prove some physical symptoms resulting from the plaintiff's mental injury.¹¹⁰ Some states, on the other hand, impose a requirement of "serious emotional injury" or something similar, which clearly goes to the *extent* of the injury.¹¹¹

Courts in Australia and the United Kingdom, along with those in some states in the United States, are clearly more comfortable about recognizing an interest in mental integrity; the criterion in those jurisdictions for actionable mental injury is simply a medically diagnosable psychiatric disorder.¹¹² This can probably be characterised as a requirement relating both to the *type* of injury and to the *extent* of the injury. It does not introduce any physical element to the injury that is recognized. The requirement makes

109. Marrs reports that as of 1992, 30 states and the District of Columbia still adhered to the physical manifestation rule. Scott B. Marrs, *Mind Over Body: Trends Regarding the Physical Injury Requirement in Negligent Infliction of Emotional Distress and "Fear of Disease" Cases*, 28 TORT & INS. L.J. 1, 17 (1992).

110. See, e.g., Thompson v. Sun City Community Hosp., 688 P.2d 647, 657 (Ariz. 1983); Dillon v. Legg, 441 P.2d 911, 920 (Cal. 1968) (though the requirement was subsequently abandoned in *Molien v. Kaiser Found. Hosp.*, 616 P.2d 813, 816 (Cal. 1980)); *Robb v. Pennsylvania R.R.*, 210 A.2d, 709, 711 (Del. 1965); *Ob-gyn Assoc. of Albany v. Littleton*, 386 S.E.2d 146, 149 (Ga. 1989); *Hatfield v. Max Rouse & Sons Northwest*, 606 P.2d 944, 955 (Idaho 1980); *Clomon v. Monroe City Sch. Bd.*, 490 So. 2d 691, 693 (La. Ct. App. 1986); *Corso v. Merrill*, 406 A.2d 300, 304 (N.H. 1979); *Ramirez v. Armstrong*, 673 P.2d 822, 826 (N.M. 1983); *Schultz v. Barberton Glass Co.*, 447 N.E.2d 109, 115 (Ohio 1983). The requirement was abandoned in Hawaii in *Leong v. Takasaki*, 520 P.2d 758, 763-64 (Haw. 1974).

111. See, e.g., *Ballinger v. Palm Springs Aerial Tramway*, 269 Cal. Rptr. 583, 586 (Ct. App. 1990); *Williams v. Baker*, 572 A.2d 1062, 1075 (D.C. App. 1990) (Ferren, J., dissenting in part); *Rodrigues v. State*, 472 P.2d 509, 520 (Haw. 1970); *Burris v. Pollack*, 545 N.E.2d 83, 91 (Ohio 1989); *Paugh v. Hanks*, 451 N.E.2d 759, 765 (Ohio 1983); *Tarolli v. Rossotti*, 532 N.Y.S.2d 672, 673 (N.Y. 1988); *Bowen v. Lumbermens Mut. Casualty Co.*, 517 N.W.2d 432, 437-38 (Wis. 1994) (noting trend towards abandoning physical requirements). See also KEETON ET AL., *supra* note 33, at 365. Such requirements were criticized and rejected by the Supreme Court of Wyoming in *Gates v. Richardson*, 719 P.2d 193, 200 (Wyo. 1986), where the court considered such limitations to be necessary only where liberal liability rules are applied to mental injury.

112. See *McLoughlin v. O'Brian*, 1983 App. Cas. 410 (1982) (appeal taken from Eng. C.A.); *Jaensch v. Coffey*, 155 C.L.R. 549 (Austl. 1984). See also *Bowman v. Williams*, 165 A.2d 182, 184 (Md. 1933) (requiring "symptoms clearly indicative of a resultant pathological, physiological, or mental state"); *Asaro v. Cardinal Glennon Memorial Hosp.*, 799 S.W.2d 595 (Mo. 1990).

sense, for as long as an interest in mental equilibrium is recognized by the law, it is anomalous to require proof of injury to another interest.¹¹³ Thus, the "diagnosability" approach, unlike the physical manifestation requirement, takes mental injury seriously. It also enables courts to be candid in their recognition of a new legally protected interest.

2. Geographical and Temporal Limitations

The three proximity guidelines in *Dillon* have been used in a mechanical way to defeat claims by persons suffering mental injury as a result of the physical endangerment of a third person.¹¹⁴ The requirement of physical proximity relates to the plaintiff's presence at the scene of the accident killing or injuring the third person and introduces a test of geographical and temporal proximity between the plaintiff and the accident. Examples of the application of this guideline include cases where a plaintiff has suffered shock on hearing of the death or injury of a loved one¹¹⁵ or by seeing or hearing of it on the electronic media.¹¹⁶ Recovery in such cases is generally denied.

There has been at least one case which suggests that recovery may be considered where the plaintiff suffers injury as a result of viewing a live telecast of events surrounding an accident involving a loved one.¹¹⁷ Here, of course, the contemporaneous nature of the experience satisfies the temporal proximity requirement, so allowing recovery makes sense, provided that claims based on injury arising out of viewing the immediate aftermath of an accident are not excluded. It is difficult to justify applying strict temporal proximity criteria while having very loose spatial criteria.

113. If Teff is correct, this limitation is not founded on logic or principle, but purely on policy. See Teff, *supra* note 63, at 100.

114. See *supra* text accompanying note 62.

115. *Kelley v. Kokua Sales & Supply*, 532 P.2d 673 (Haw. 1975) (holding that father, who was in California where he suffered a fatal heart attack upon learning that his daughter and grandchildren died in a car accident in Hawaii, was not within reasonable distance of accident to have a claim for emotional distress). On geographical limitations generally, see Miller, *supra* note 64, at 9-13.

116. *Brownie Miller v. National Broadcasting Co.*, 232 Cal. Rptr. 668 (Ct. App. 1987) (denying recovery to wife and daughter who saw death of husband/father on television documentary about paramedics); *Gain v. Carroll Mill Co.*, 787 P.2d 553 (Wash. 1990) (denying recovery to plaintiffs who saw their relative, a state trooper, killed on television).

117. *Gain*, 787 P.2d at 557. The question was not decided, however, because the plaintiffs did not specifically plead that witnessing the telecast was the cause of their injuries. In *Alcock v. Chief Constable of South Yorkshire Police*, [1992] 1 App. Cas. 310 (1991) (appeal taken from Eng. C.A.), many plaintiffs were denied recovery on the basis that they learned of an event causing injury or death to another by a live telecast or broadcast rather than from their presence at the scene.

3. The Aftermath/Percipient Witness Rule

A third remaining limitation is the "percipient witness" rule, encapsulated by the second of the guidelines in *Dillon*, which stated that the plaintiff should have witnessed the events causing the death of or injury to the third person. Other courts have taken this requirement very seriously and have denied recovery where the plaintiff arrived at the scene of an accident that killed or injured a loved one only moments later.¹¹⁸

Situations have arisen that illustrate the arbitrariness that is bound to ensue if the percipient witness rule is applied in a hard and fast manner. In one case, the plaintiff's son was injured by radiation during treatment for curable cancer; since the injuring agent was invisible, recovery was denied, even though the plaintiff witnessed the ghastly consequences to the child's health, leading to his death.¹¹⁹ Cases such as *Molien v. Kaiser Foundation Hospitals*¹²⁰ also point to difficulties in the very requirement of a single "shock-producing occurrence,"¹²¹ because not all negligence takes that form.¹²²

118. See, e.g., *Hathaway v. Superior Court*, 169 Cal. Rptr. 435, 440 (Ct. App. 1980) (denying recovery to parents who were in hearing distance of, but did not see, their son's fatal electrocution on the grounds that, by the time the parents arrived on the scene less than two minutes later, the boy "was no longer . . . receiving the electrical charge"); *Arauz v. Gerhardt*, 137 Cal. Rptr. 619, 627 (Ct. App. 1977) (denying recovery to mother who arrived on scene five minutes after her son had been struck by a car on the grounds that she was neither present "at the time of the impact" nor "near enough . . . to have any sensory perception of the impact"). On the other hand, the plaintiff could recover in similar circumstances in *Archibald v. Braverman*, 79 Cal. Rptr. 723 (Ct. App. 1969), because she could be presumed to have heard the explosion that injured her son.

119. *Golstein v. Superior Court*, 273 Cal. Rptr. 270, 272 (Ct. App. 1990). Anyone who has ever seen even a cinematographic depiction of the physical results of radiation sickness must marvel at the proposition that the sight of one's child suffering from it is not a "shock-producing occurrence." See also *Cortez v. Marcias*, 167 Cal. Rptr. 905, 907 (Ct. App. 1980) (plaintiff saw her child die in hospital, but thought that it was going to sleep: since her shock did not arise from witnessing the death, but from being told of it moments later, recovery was denied); *Mobaldi v. Regents of Univ. of Cal.*, 127 Cal. Rptr. 720, 722 (Ct. App. 1977) (plaintiff saw foster-child become comatose after being negligently injected with overdose of glucose solution; recovery denied as she did not know at the time that it was the overdose which was causing the child's condition); *Jansen v. Children's Hosp. Medical Ctr.*, 106 Cal. Rptr. 883, 885 (Ct. App. 1973) (mother watched child die a long and painful death caused by misdiagnosis; recovery denied as misdiagnosis not perceived as a sensory observation).

120. 616 P.2d 813 (Cal. 1980). See *supra* notes 69-78 and accompanying text.

121. See, e.g., *Alcock v. Chief Constable of South Yorkshire Police*, [1992] 1 App. Cas. 310 (1991) (appeal taken from Eng. C.A.); *Page v. Smith* [1995] 2 All E.R. 736, 739 (Lord Keith of Kinkell, dissenting), 751-52 (Lord Jauncey of Tullichettle, dissenting).

122. Though, as has been seen, that fact was seen as sufficient reason to distinguish *Molien* from *Dillon*. See *supra* text accompanying note 76. This might mean

Some courts, notably those in Australia and the United Kingdom, have held that the fact that a plaintiff witnessed only the aftermath of the accident that killed or caused injury to a loved one is not a bar to recovery.¹²³ Recovery in those jurisdictions extends, for example, to injury caused by experiences at the hospital to which the third person was taken.¹²⁴ The significance of the "aftermath" cases is that the plaintiff has not witnessed the accident itself so the injury is more likely to be caused by the realization of the nature of the injury than by the shock to the senses. In *Jaensch v. Coffey*, Justice Deane of the High Court of Australia reasoned:

It would, in my view, be both arbitrary and out of accord with common sense to draw the borderline between liability and no liability according to whether the plaintiff encountered the aftermath of the accident at the actual scene or at the hospital to which the injured person had been quickly taken. Indeed . . . in some cases the true impact of the facts of the accident itself can only occur subsequently at the hospital where they are known.¹²⁵

This approach is preferable to the percipient witness rule because it looks directly to what mental injury is and the fact that it is caused by injury to a loved one; while witnessing the event causing that injury may well be more traumatic than learning about it afterwards, that is not the end of the story.¹²⁶ The Australian ap-

that *Dillon* does not really stand for the proposition that the plaintiff must have witnessed a shock-producing occurrence, but for the proposition that where there was such an occurrence, the plaintiff must have witnessed it (or should have witnessed it, depending on how flexibly the criteria are applied). It might therefore be concluded that the plaintiff's chances of recovery are dependent upon how his or her shock was caused: if by some sudden visible occurrence, he or she is limited by *Dillon*, and if in some other way, he or she has the chance to make out a "direct victim" case. This would be a peculiar result, if the *Dillon* court's opinion was correct that witnessing a violent occurrence is what makes mental injury foreseeable. *But see infra* part III.A.2.

123. *See, e.g., Jaensch v. Coffey*, 155 C.L.R. 549 (Austl. 1984); *McLoughlin v. O'Brian*, 1983 App. Cas. 410 (1982) (appeal taken from Eng. C.A.); *Ferriter v. Daniel O'Connell's Sons, Inc.*, 413 N.E.2d 690 (Mass. 1980); *Bowen v. Lumbermens Mut. Casualty Co.*, 517 N.W.2d 432 (Wis. 1994) (but maintaining that recovery does not extend to plaintiffs who attended the "aftermath" at the hospital or even in the ambulance; the plaintiff must witness an "extraordinary event").

124. Examples of such experiences might be seeing and talking to the physically injured person, discussing the injuries with medical personnel, and being involved in decisions about treatment. *See, e.g., Jaensch v. Coffey*, 155 C.L.R. 549 (Austl. 1984); *McLoughlin v. O'Brian*, 1983 App. Cas. 410 (1982) (appeal taken from Eng. C.A.).

125. 155 C.L.R. at 608.

126. *See Diamond, supra* note 61, at 486-89. *See also* Ferdinand F. Stone, *Louisiana Tort Doctrine: Emotional Distress Occasioned by Another's Peril*, 48 TUL. L. REV. 782, 794 (1974) ("[t]here would seem to be no magic in the sense of sight alone, since other senses can convey the phenomena which create shock"); Teff, *supra* note 63, at 100 (stating that the only possible justification for such a limitation is policy), 106-107 ("There is medical support for the view that, in some circumstances, hearing of the loss of a loved one in an accident could prompt an even stronger reaction than

proach recognizes the importance of relationships in a way that United States jurisdictions adhering to the percipient witness rule have failed to do.¹²⁷ It allows more scope for recognition that what matters is feeling for the injured person, rather than a spectacular sight.

4. Post-accident Care

Another way of limiting recovery on the basis of notions of proximity is to exclude claims where the immediate cause of the plaintiff's mental injury is the stress of caring for and/or witnessing the effect of the harm on a negligently injured loved one.¹²⁸

5. Liability to the Third Person

A fifth lingering limitation on recovery relates to the relationship between the defendant and the person whose death or physical injury precipitated the plaintiff's mental injury. This aspect of the *Dillon* decision is often overlooked by its detractors: the court insisted that the defendant must be liable to the third person before the plaintiff can recover.¹²⁹ Many other courts have held similarly.¹³⁰ Thus, if the third person contributed to his or her own in-

seeing it, given the human mind's propensity for constructing an image of an event even more gruesome than the reality."); Golden, *supra* note 36, at 677 (urging that, "[a]lthough the degree of shock may be more severe where a plaintiff actually witnesses the accident, this matter should be a question for the jury in determining damages, rather than for the court in determining whether a cause of action exists").

127. It must be noted, however, that even in Australia recovery has been denied on the basis that the plaintiff's mental condition was caused by something gradual rather than sudden. In *Council of Campbelltown v. McKay*, 15 N.S.W.R. 501 (1989), the New South Wales Court of Appeal denied a "nervous shock" action to a young couple who had witnessed the deterioration and eventual collapse of their home. They did recover, however, in respect of their psychiatric conditions, in the form of "parasitic" damages.

128. The suggestion of such an exclusion was expressly made by Justice Deane in *Jaensch v. Coffey*. This limitation might appear to be just another version of the percipient witness rule, or of spatial and temporal criteria, but Justice Deane expressly rejected all of these rationales, preferring to justify the limitation on the basis of "causal proximity." 155 C.L.R. at 606. See also *Jensen v. L.C. Whitford Co.*, 562 N.Y.S.2d 317 (1990).

129. See *Dillon v. Legg*, 441 P.2d 911, 916 (Cal. 1968).

130. See, e.g., *Allen v. Toten*, 218 Cal. Rptr. 725, 728 (Ct. App. 1986); *State v. Eaton*, 710 P.2d 1370, 1377 (Nev. 1985); *Dawson v. Garcia*, 666 S.W.2d 254, 259-60 (Tex. Ct. App. 1984) (holding specifically that this means a claim may be defeated by the application of comparative negligence principles). In *Jaensch v. Coffey*, Justice Deane hinted that a defendant should be liable to the third person, but did not need to decide that issue. 155 C.L.R. at 604-05.

A related requirement is that the third person should have suffered serious injury or death. See *Portee v. Jaffee*, 417 A.2d 521, 527-28 (N.J. 1980); *Ramirez v. Armstrong*, 673 P.2d 822, 826 (N.M. Ct. App. 1983). Such requirements would presumably mean that a plaintiff who thought his or her child had been injured, when that was not the case, would not recover. It becomes clear that courts imposing such

jury, liability for mental injury depends on the law of contributory negligence in the jurisdiction where the action is brought. If contributory negligence is a complete bar to recovery, the plaintiff's claim will also be barred; if it is grounds for apportionment, the plaintiff's damages will also be apportioned, and so on.

6. The Plaintiff's "Irrational Guilt Feelings"

Finally, there appears to be an interesting exception for a rare category of case involving what courts have deemed to be "irrational" guilt. These are cases where the plaintiff blamed him- or herself for another's injury or death and suffered mental injury as a result. The best example is the Australian case of *Rowe v. McCartney*, where the plaintiff had reluctantly succumbed to defendant's persuasion and allowed him to drive her car.¹³¹ The defendant had driven negligently and both he and the plaintiff were injured. The plaintiff suffered relatively minor physical injuries (though they included a broken pelvis), but the defendant became a quadriplegic; the plaintiff also suffered depression as a result of blaming herself for the defendant's severe injuries, since they would not have occurred if she had not let him drive.¹³²

By a two-to-one majority, the New South Wales Court of Appeal upheld the plaintiff's recovery of damages for her physical injuries, but held that she was not entitled to damages for her mental injury since it was caused by guilt which was irrational in these circumstances, for the accident was not her fault, and therefore unforeseeable.¹³³ If, by contrast, her depression had arisen out of her own injuries, or out of her presence at or direct involvement in the event causing the defendant's injuries, she would have been able to recover under the parasitic damages theory or under the then-existing Australian law relating to mental injury occasioned by the death of or injury to another.¹³⁴ However, the plaintiff was undone by the fact that her mental injury arose out of guilt at having allowed the defendant to drive. Even though it was clear that the defendant breached a duty to the plaintiff, the court of appeals denied her the extra damages on the basis that her mental injury was too "remote."

requirements still see the plaintiff's action as derivative of the third person's action. For criticism of this approach, see *infra* text accompanying notes 229-30. Miller comments that the requirement "is inconsistent with general principles of causation." Miller, *supra* note 64, at 4.

131. [1976] 2 N.S.W.R. 72.

132. *Id.*

133. *Id.* at 76, 90.

134. See, e.g., *Mount Isa Mines Ltd. v. Pusey*, 125 C.L.R. 383 (Austl. 1970).

Only one United States case deals with the problem of the plaintiff's guilt. In *Clomon v. Monroe City School Board*¹³⁵ the plaintiff had accidentally run down and killed a child at a school crossing; she sued the school board in negligence for not having sufficient safety procedures to protect the child.¹³⁶ The Louisiana Court of Appeals held that the board's duty extended to motorists who might injure the children, in respect of mental injury they might suffer as a result of being "precipitated by the fault of the defendant into the position of the actor whose conduct causes injury to another."¹³⁷ *Clomon* may perhaps be distinguished from *Rowe* on the basis that the plaintiff *was* partly at fault, or partly "responsible" in a legal sense, and thus one can imagine the *Rowe* court finding her guilt "rational" and foreseeable. But this is an unsatisfactory result, where the plaintiff's own tort enables her to recover, whereas an innocent plaintiff is excluded.¹³⁸

Still, *Rowe* stands as an example, if a marginal one, of the proposition that plaintiffs claiming damages for mental injury need to prove that their injury was rational, and that only rational injuries are foreseeable in the eyes of the law.

Although the common law has progressed significantly in the last century in recognizing a cause of action for mental injury occasioned by negligently-inflicted harm to a person other than the plaintiff, it is clear that such claims are still looked on with disfavour. Some United States jurisdictions still adhere to the antiquated and largely discredited impact and zone of danger rules, and

135. 490 So. 2d 691 (La. Ct. App. 1986).

136. 557 So. 2d 1100 (La. Ct. App. 1990).

137. 490 So. 2d at 692-93. In a later appeal, the plaintiff having been found to be 30% at fault at trial, the issue was raised as to whether her post-traumatic stress disorder was caused by criminal charges pending against her or by having witnessed the accident. See *Clomon v. Monroe City Sch. Bd.*, 557 So. 2d 1100, 1102 (La. Ct. App. 1990). The court of appeals refused to disturb a jury finding in her favour. It is submitted that whatever the cause of her injury, she should have recovered, because the criminal charges and any resultant stress were still foreseeable consequences of the situation into which she was "precipitated." The issue is admittedly a difficult one, raising as it does complicated questions about the relationship between the civil and criminal law. However, one must bear in mind that it was likely that she would be acquitted of the criminal charges, in spite of her 30% responsibility in the eyes of the civil law, and the worry and anxiety of having charges pending would be able to be considered 70% the result of the defendant's negligence. Given the presumption of innocence, this is the better approach to take.

138. Another distinction may be that in *Clomon* three parties were involved (the plaintiff, the defendant and the child), whereas in *Rowe* there were only two. Many people seem to find it peculiar, at first blush, that the plaintiff in *Rowe* seemed to be suing the defendant for injuring himself. (I make this observation on the basis of the reactions of my students when I have been teaching the case, and others with whom I have discussed it). Perhaps this was what really troubled the majority in that case, but it must be noted that no such observation was made in the opinions.

even those that have abandoned those rules still impose significant limitations on recovery. In Part II, I consider the purported justifications for these limitations, both from the point of view of policy and from the point of view of doctrine.

II. The Policy (Non-)Justifications for the Rules

In this Part, I will consider the rules described in Part I in relation to the avowed policy concerns of the courts and the commentators that are put forward to justify restrictive liability rules.¹³⁹ My analysis shows that policy does not support the restrictive approaches courts have taken. The policy reasons either are generally suspect, or apply equally to other types of injury and so do not justify special rules relating to mental injury, or are used to justify rules that do not and cannot have the effect of addressing the named concerns.

The main policy reasons traditionally offered for the apparent privileging of physical over mental injury are: (1) mental injury is usually transient or trivial; (2) mental injury is easily feigned, so allowing a cause of action will encourage fraudulent claims; (3) mental injury is something that may happen to many people as a result of one accident, giving rise to liability which is disproportionate to the defendant's fault; and (4) courts cannot cope with the administrative burden likely to be imposed if the cause of action is recognized (the "floodgates" argument).¹⁴⁰ In this section I argue that not all of these considerations are the proper concern of the law and that, in any event, the rules which have been applied to mental injury do not necessarily effectively address the purported policy considerations. If this is true, we need to wonder what the true basis of the rules is.

139. See *Bowen v. Lumbermens Mut. Casualty Co.*, 517 N.W.2d 432, 443-45 (Wis. 1994).

140. The "floodgates" argument is often paired up with the fraud argument: the stated concern is that there will be a flood of *fraudulent* claims. Certainly if fraudulent claims are a good reason to exclude liability, a flood of them is an even better reason, but pairing the two arguments up in this way appears to be simply an attempt to compensate for the weaknesses in either one standing alone. See Brody, *supra* note 36, at 259 (asserting that the fraud argument is "little more than make-weight"). For this reason, they will be dealt with separately here.

Another argument is that such damage is difficult to measure in money terms. See, e.g., *Black v. Carrollton R.R.*, 10 La. Ann. 33 (1855) *discussed in* *Lejeune v. Rayne Branch Hosp.*, 556 So. 2d 559, 561-62 (La. 1990). This argument is easily disposed of by pointing out that it poses no greater difficulty than pain and suffering when awarded as "parasitic" damages. See *Schultz v. Barberton Glass Co.*, 447 N.E.2d 109, 112 (Ohio 1983); *KEETON ET AL.*, *supra* note 33, at 360; Brody, *supra* note 36, at 259; McNiece, *supra* note 30, at 10; Stone, *supra* note 126, at 791.

A. Triviality

One significant theme in the development of mental injury law is the notion that mental injury is inherently insignificant or trivial.¹⁴¹ However, triviality as an argument is not advanced very often these days, probably because of widespread medical acceptance of the seriousness of mental disability. "Law, marching with medicine but in the rear and limping a little,"¹⁴² has in some jurisdictions come to recognize that mental injury is not *necessarily* trivial. However, the idea seems to linger in most jurisdictions that mental injury is simply something to be borne stoically, without recourse to the legal system.¹⁴³ If this is true, it could explain courts' continuing discomfort with allowing redress for the injury and many of the law's restrictive recovery rules, particularly the lingering limitations discussed above.¹⁴⁴

Since courts have limited time and resources, there is something to be said for excluding trivial claims. One might wonder, however, why the law's traditional methods for keeping trivial claims out of the courts have not been deemed sufficient in the area of mental injury, and why the law has not imposed limitations in physical injury cases which are aimed to exclude trivial claims. Traditionally, courts have trusted plaintiffs and their attorneys to exercise judgment and economic rationality when deciding whether to bring a claim in the first place. If an injury is not sufficiently serious, it is simply uneconomical to bring a suit. It must be asked why the victims of mental injury (and their lawyers) are to be trusted any less than those of physical injury.

If the physical manifestation requirement¹⁴⁵ were to be justified on the basis of concerns about triviality, it would have to be because courts automatically regard physical injuries as serious, which would be unsound logic.¹⁴⁶ The requirement does not address triviality concerns because it does not exclude all but the most serious injuries. For one thing, mental injury may be very severe without physical manifestations or illness. More fundamentally, the very distinction between mental and physical injuries is on shaky ground.¹⁴⁷ There is certainly no ground in logic or legal prin-

141. See generally Calandrella, *supra* note 41.

142. Mount Isa Mines Ltd. v. Pusey, 125 C.L.R. 383, 395 (Austl. 1970).

143. KEETON ET AL., *supra* note 33, at 360; Miller, *supra* note 64, at 34; Pearson, *supra* note 32, at 508; Teff, *supra* note 63, at 105.

144. See *supra* part I.E.

145. See *supra* part I.E.1.

146. See *supra* notes 109-10 and accompanying text.

147. The Wisconsin Supreme Court recently suggested that the physical manifestation requirement "[h]as encouraged . . . meaningless distinctions between physical

ciple for suggesting that physical injuries are necessarily *more serious* than mental injuries. Indeed, many commentators have observed that mental injury is in fact more devastating than physical because a physically disabled person can still enjoy life and make a positive contribution to society, whereas a mentally injured person is unlikely to have any such ability. Either physical or mental injury may be serious or trivial, and so as a matter of principle the same requirements as to seriousness should be imposed on both.¹⁴⁸ Yet, as noted above, they are not, apparently on the basis that mental injury plaintiffs and their lawyers cannot be trusted to be economically rational.

A further example of the arbitrary distinctions between mental and physical injury is the post-accident care limitation, discussed above.¹⁴⁹ The difference between mental injury occasioned by involvement in the aftermath and mental injury occasioned by post-accident care is that one manifests itself later than the other. Statutes of limitations aside, no such limitation exists with respect to physical injury.¹⁵⁰ If the physical injury resulting from the defendant's negligence manifests itself only some time after the commission of the negligence, this is not seen as a reason to exclude the physical injury claim of an otherwise deserving plaintiff. The justification for not taking the same approach to mental injury is not immediately obvious. Ultimately, it is very difficult to see what ground there is in logic or legal principle to differentiate between mental and physical injury.

Requirements which go to the *extent* rather than the *kind* of injury,¹⁵¹ on the other hand, clearly do have the capacity to address concerns about triviality. However, they are in fact bound to operate as arbitrary limitations. Results will ultimately depend on the amount of sympathy a plaintiff can inspire in the person or persons responsible for assessing damages. Triviality is a question of de-

and emotional symptoms." *Bowen v. Lumbermens Mut. Casualty Co.*, 517 N.W.2d 432, 443 (Wis. 1994).

148. It may be objected that to exclude physical injury claims on the basis of triviality would be too great a break with the tradition of the common law and that only the legislature could do such a thing. The only way that this could be argued convincingly would be to say that only the legislature has the resources for setting the standards with some degree of precision. However, the common law has already introduced seriousness requirements with respect to mental injury, and there is no reason it could not do the same with physical injury.

149. See *supra* part I.E.4.

150. Even under many statutes of limitations, there is allowance for latent injuries of which the plaintiff could not reasonably have known within the limitation period. See KEETON ET AL., *supra* note 33, at 164-66.

151. For example, a requirement of "serious emotional distress." See *supra* part I.E.1.

gree, but a requirement that the plaintiff prove, for example, "serious emotional distress" treats the matter as one involving a clear distinction. The law needs clear distinctions, but triviality does not provide one, so the law would do better to look to a standard that can.

One such standard would be the time-honored common law principle that mere grief and upset do not sound in damages. The preferable approach is to impose a limitation on recovery that follows the distinction between "mere grief and upset" and lasting, debilitating mental disturbance. This is what the Anglo-Australian "diagnosibility" approach¹⁵² does. It bases the restriction on the type of injury, rather than the extent, thus providing a clear distinction that is both logically and doctrinally sound. It also, unlike "serious emotional distress," introduces an independent party (an expert medical witness) to certify that the correct type of injury has indeed been suffered. In this way it provides a principled and predictable method for limiting claims.

In sum, many of the restrictive rules fail to live up to their justification on the basis of triviality, either because they fail to keep trivial injuries out of the courts or because, in doing so, they operate in an arbitrary or unprincipled way.

B. Fraud

The fraud argument is that mental injury is easily feigned and thus its recognition by the law raises a danger of fraudulent claims.¹⁵³ Some general objections may be raised against this argument. First, courts and commentators have noted that even if the danger does exist, it is better to allow some fraudulent claims than to exclude genuine ones.¹⁵⁴ Furthermore, it can be argued that mental injury is not appreciably easier to feign than many types of physical injury.¹⁵⁵ Finally, the courts do have mechanisms

152. See *supra* text accompanying note 112.

153. See *Negligently Inflicted Mental Distress*, *supra* note 36, at 1244; Finneran, *supra* note 34, at 216-17 (noting the comparative ease of observation of physical injury).

154. See, e.g., *Dillon v. Legg*, 441 P.2d 911, 917-18 (Cal. 1968); *Johnson v. Jamaica Hosp.*, 467 N.Y.S.2d 634, 688 (1983); McNiece, *supra* note 30, at 31.

155. See *Schultz v. Barberton Glass Co.*, 447 N.E.2d 109, 111-12 (Ohio 1983); Brody, *supra* note 36, at 236, 245-48. It has also been noted that mental injury raises no more difficulties of causation than physical injury. *Falzone v. Busch*, 214 A.2d 12, 15 (N.J. 1965); Note, *Torts—Expanding the Concept of Recovery for Mental and Emotional Injury*, 76 W. VA. L. REV. 176, 186 (1973-1974) [hereinafter *Expanding the Concept of Recovery*]. But see Hubert Winston Smith, *Problems of Proof in Psychic Injury Cases*, 14 SYRACUSE L. REV. 586, 593 (1963) (noting the "[a]mbiguities and dangers of interpretation . . . inherent in subjective symptoms, as contrasted with objective signs").

for assuring themselves of the genuineness of claims, notably by expert medical evidence.¹⁵⁶ Provided the defence has the opportunity to present its own expert evidence about the plaintiff's injury, there is a substantial barrier to fraudulent claims already built into the system. Furthermore, scrutiny of the various rules developed by the courts shows that they have been for the most part unable to solve the perceived problem.

First, the impact rule, although supposedly designed to guard against fraudulent claims, was¹⁵⁷ unable to do so because it allowed claims to stand on even the slightest touching.¹⁵⁸ Courts adopting this logic must have believed that physical impact was *the only way* that mental injury could come about, but such a position would appear to be contrary to both common sense and medical knowledge.¹⁵⁹ It is difficult to see how dust in the eye or inhalation of smoke is more likely to cause serious fright and injury than the threat of a horrific accident.¹⁶⁰

156. As one court explained, "[d]ue to advances in medical research and improved diagnostic techniques, the presence of emotions such as grief, anxiety, and anger is frequently accompanied by physical indicia that are capable of objective proof." *Williams v. Baker*, 572 A.2d 1062, 1067 (D.C. Cir. 1990). See also *Negligently Inflicted Mental Distress*, *supra* note 36, at 1261 (noting that even if reliance on medical evidence can lead to a "battle of the experts," this problem "is not unique to mental distress cases").

It has also been suggested that "[t]he responsibility of weeding out fraudulent claims rests on courts, juries and the adversary system." *Barnhill v. Davis*, 300 N.W.2d 104, 106 (Iowa 1981). See also *Dziokonski v. Babineau*, 380 N.E.2d 1295, 1299 (Mass. 1978); *Falzone v. Busch*, 214 A.2d 12, 16 (N.J. 1965); *Battalla v. State*, 176 N.E.2d 729, 731 (N.Y. 1961); *Sinn v. Burd*, 404 A.2d 672, 678-80 (Pa. 1975); *Niederman v. Brodsky*, 261 A.2d 84, 88-89 (Pa. 1970); *Brody*, *supra* note 36, at 250; *Stone*, *supra* note 126, at 791 (arguing that the concern with fraud is "an insult to the whole judicial process dedicated as it is to the winnowing of true claims from false ones").

157. See *supra* notes 36-37 and accompanying text. See also KEETON ET AL., *supra* note 33, at 363. Although I use the past tense when speaking of the impact rule, it should be noted that the rule is still in use in some United States jurisdictions. See, e.g., *Ob-gyn Assoc. of Albany v. Littleton*, 386 S.E.2d 146 (Ga. 1989). In *Williams v. Baker*, 572 A.2d 1062 (D.C. Cir. 1990), the following jurisdictions were listed as still adhering to the impact rule: Arkansas, Georgia, Indiana, Kentucky, Oklahoma and Oregon. *Id.* at 1066 n.11. Since then, Florida has abandoned the rule, see *Zell v. Meek*, 20 Fla. Law. W. S. 515 (Oct. 5, 1995), and Indiana has modified it, see *Shuamber v. Henderson*, 579 N.E.2d 452 (Ind. 1991).

158. See *supra* notes 38-39 and accompanying text.

159. Though perhaps it would not appear contrary to the medical knowledge of the time when the rule was formulated.

160. This type of observation has been instrumental in leading courts to reject the impact rule. See *Falzone v. Busch*, 214 A.2d 12, 16 (N.J. 1965); *Williams v. Baker*, 572 A.2d 1062 (D.C. Cir. 1990); *Battalla v. State*, 176 N.E.2d 729, 731 (N.Y. 1961). See also *Miller*, *supra* note 64, at 34. The Supreme Court of California in *Dillon v. Legg* noted that the zone of danger rule did not guard against fraudulent claims either. 441 P.2d 911, 918 (Cal. 1968).

If, on the other hand, the connection between the impact rule and the prevention of fraud went to the plaintiff's credibility, it might be noted that a plaintiff who has been physically touched is no less likely to fabricate a claim than one who has not.¹⁶¹ Thus, the courts' logic must have been that it was simply easier to believe physical impact could lead to physical injury than to believe mental or emotional impact could result in physical injury. However, this analysis is more a question of factual causation than of the plaintiff's credibility. It must therefore be further noted that the causal connection is not necessarily easier to find between touching and injury than between fright and injury. Moreover, the impact rule did not require the plaintiff to show that the ultimate injury was caused by the touching.¹⁶² In fact, his or her injury may have been a direct result of fear, and the touching may have been a minor or even insignificant link in the chain of events which led to the injury.¹⁶³

Thus, although the rule appeared to be but a minor step away from the "parasitic damages" position,¹⁶⁴ it in fact led the law on something of a tangent. The courts, contrary to their assertions, were happy to find a causal connection between fright and physical injury. The rule, as a tool for alleviating proof of causation difficulties, was worse than imprecise: it was completely arbitrary.¹⁶⁵

Second, the "strong version" of the zone of danger rule,¹⁶⁶ if justified on the basis of the fraud argument, would mean that

161. Indeed, it has been suggested that the impact rule in fact encourages perjury. *Battalla v. State*, 176 N.E.2d 729, 731 (N.Y. 1961); McNiece, *supra* note 30, at 31, 80-81. It is easy to see how this could happen. Many of the situations to which it will be applied will have been fraught with confusion, and it will be easy for a plaintiff to assert that she was touched when in fact she was not, since other people present at the scene are likely to have been in fear themselves and not closely watching what is touching whom. It has been further pointed out that it is also easy to fabricate a claim relating to physical injury. See Brody, *supra* note 36, at 236.

162. Chamallas and Kerber note that the "common justification for the impact rule [that] treated it as a corollary of the more general legal principle that limited recovery to material, as opposed to emotional, harms . . . was completely undercut by cases where the physical impact was slight and it was clear that it was fright which produced the plaintiff's injuries." Chamallas & Kerber, *supra* note 9, at 819-20. See also *Negligently Inflicted Mental Distress*, *supra* note 36, at 1239-40.

163. See, e.g., *Homans v. Boston Elevated Ry.*, 62 N.E. 737 (Mass. 1902), discussed in Chamallas & Kerber, *supra* note 9, at 829-30.

164. See *supra* text accompanying notes 33-34. It has been pointed out that even "parasitic" damages for mental pain and suffering may be causally linked to the physical injury in only a tenuous way. *Dziokonski v. Babineau*, 380 N.E.2d 1295, 1301 (Mass. 1978).

165. Courts rejecting the impact rule have considered that it is better to deal with proof problems as they arise, rather than imposing a blanket exclusion on account of the possibility of such problems. See, e.g., *Battalla v. State*, 176 N.E.2d 729, 731 (N.Y. 1961).

166. See *supra* notes 43-45 and accompanying text.

mental injury can be caused (or is at least easier to believe) only if it arises out of fear for one's own safety.¹⁶⁷ This, too, would appear to ignore the observable fact that people care about each other, and that this tendency is considered in many quarters to be a positive human trait, though the notion that there is something unnatural about being concerned about the safety of others appears to have some support in medical quarters.¹⁶⁸ The "weak version" of the zone of danger rule¹⁶⁹ is even more difficult to justify on the basis of concerns about fraud, because it predicates liability on a physical threat which was not necessarily perceived by the plaintiff. Since the injury is a product of the plaintiff's own apprehensions, there is no connection whatsoever between the liability rule and the injury, or its genuineness. The fact that we may say later that a plaintiff was physically endangered by the defendant's negligence does not lead to the conclusion that he or she is any more or less likely to be fabricating a claim.

Finally, the *Dillon* criteria¹⁷⁰ are not supported by the fraud argument. Admittedly, the criteria do purport to address the problem of foreseeability, rather than the fraud problem. However, there is a close logical connection between foreseeability and genuineness: an injury's unforeseeability makes it easy to be suspicious of its reality.¹⁷¹ Thus, to the extent that the *Dillon* criteria are adequate guidelines for foreseeability, they are also safeguards against fraud. Their capacity to prevent fraud is limited by their concern with generalities rather than the particular plaintiff and fact situation. The connection between foreseeability and genuineness is not so close that it is safe to assume that any injury is genuine just because it is foreseeable, or vice-versa, and so the fraud problem is still better addressed by strict scrutiny of the evidence in each individual case.

167. This would be different than saying that only abnormal people suffer such injury in this way.

168. See generally Hubert Winston Smith, *Relation of Emotions to Injury and Disease: Legal Liability for Psychic Stimuli*, 30 VA. L. REV. 193 (1944), discussed in Chamallas & Kerber, *supra* note 9, at 846-51.

169. See *supra* notes 43-45 and accompanying text.

170. The *Dillon* criteria are spatial proximity, sensory perception and close relationship to the third person. *Dillon v. Legg*, 441 P.2d 912, 920-21 (Cal. 1968). See *supra* text accompanying note 62.

171. See Finneran, *supra* note 34, at 229 (noting that the only difference between the foreseeability of injury approach and the genuineness of injury approach is that the former is determined by the jury and the latter by the judge). The court in *Johnson v. Jamaica Hosp.* justified the "direct victim" exception to New York's restrictive liability rules on the basis that "an especial likelihood of genuine and serious mental distress . . . serves as a guarantee that the claim is not spurious." 467 N.Y.S.2d 634, 636 (App. Div. 1983) (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 54, at 330 (4th ed.)).

It has been suggested that the physical manifestation requirement addresses fraud concerns; some courts believe that mental injury is objectively verifiable only when it results in some physical manifestation.¹⁷² This argument would appear to overlook the availability of expert medical testimony about psychiatric diagnosis, and moreover the possibility that the very fact of what a plaintiff has endured might be sufficient evidence that he or she has suffered a mental disturbance. That is, there will be situations where one would think only a very strange person indeed would *not* suffer such a disturbance.

Nor are requirements relating to the seriousness of the injury tuned to the detection of fraudulent claims—that is, they may well exclude some or even many fraudulent claims, but if they do, it will be by coincidence.

Ultimately, it is difficult to resist the conclusion that the law's traditional methods for identifying fraudulent claims are as adequate in mental injury cases as in any other type of case, and therefore any additional restrictions on recovery in the areas of mental injury are not justified by the fraud argument.

C. *Disproportionality*

It is often suggested that one of the main problems with mental injury is that, while one can endanger only so many people physically with a negligent act, the number of persons potentially emotionally affected by that act is much greater, if not limitless.¹⁷³ Thus, if liability is allowed for mental injury, one small act of negligence can lead to unlimited liability. This, in a nutshell, is the argument based on disproportionality between culpability and liability. The argument is deeply flawed, and is moreover inconsistently applied, which suggests that it is really only a convenient excuse for limitations which in fact address other concerns.¹⁷⁴

172. See generally Calandrella, *supra* note 41. The requirement could be understood as a way of limiting recovery to the most serious injuries, but the practical effect of the requirement is to limit recovery to plaintiffs who suffer a particular *kind* of injury. It appears that even the slightest physical manifestation will suffice to enable the plaintiff to recover; at least, extensive research has failed to produce a case where a plaintiff failed for having a "physical manifestation" which was too trivial.

173. See *supra* note 55 and accompanying text.

174. The disproportionality argument is particularly strange in the context of mental injury occasioned by harm to another person, for, as the Supreme Court of Rhode Island has observed, "where a mother actually witnessed the death of her child, the resulting mental distress can hardly be deemed so fantastic or freakish as to make the imposition of liability a moral outrage." *D'Ambra v. United States*, 338 A.2d 524, 529 (R.I. 1975). Furthermore, it has been observed that "there is plenty of moral blame flowing from a tortfeasor who negligently injures or kills another to

It can be argued at the outset that proportionality is simply an inappropriate basis for limiting recovery in *any* category of tort case. It has traditionally been thought that the main purposes of the tort system are compensation and deterrence.¹⁷⁵ The latter objective is concerned less with punishment than with the imposition of a sanction to make people think twice about being negligent (or committing some other tort).¹⁷⁶ An exception to this, of course, is the imposition of punitive or exemplary damages in cases where the defendant's conduct is sufficiently egregious to justify the use of the tort system for punishment.¹⁷⁷ Otherwise, punishment is generally thought to be the province of the criminal law, where sanctions are set according to, *inter alia*, the degree of wrongfulness of the conduct in question.¹⁷⁸

Generally speaking, negligence law does not concern itself with degrees of wrongfulness. Even in the area of punitive damages, it draws a line that differentiates situations calling for such damages from those that do not. Certainly in the area of compensatory damages, the general rule is that once conduct is declared negligent, the plaintiff recovers for *all* losses caused by that negligence.¹⁷⁹

In short, the business of tort law is one of line-drawing, not one of moral fine-tuning. This kind of system should not even attempt to concern itself with balancing culpability and liability, because it simply does not possess the analytical tools to do so effectively, nor is such an exercise part of its "official" mission.

justify recovery by a family member who witnesses the event in horror." *Gates v. Richardson*, 719 P.2d 193, 197 (Wyo. 1986).

175. RESTATEMENT (SECOND) OF TORTS § 901 (1979). Another worthy goal sought by the tort system is the vindication of plaintiffs—the formal recognition that they have suffered an injury and formal condemnation of the person who caused that injury. *Id.* Hepler argues that this goal is particularly important in mental injury cases. Hepler, *supra* note 2, at 73.

176. See RESTATEMENT (SECOND) OF TORTS § 901 cmt. c (1979) (explaining that tort law, "which was once scarcely separable from the criminal law, has within it elements of punishment or deterrence").

177. RESTATEMENT (SECOND) OF TORTS § 908 (1979). See also KEETON ET AL., *supra* note 33, at 9-12; FLEMING, *supra* note 33, at 206.

178. See MODEL PENAL CODE § 6.06 (providing range of prison sentences) and Art. 7 (setting out criteria for application of different types of sentence) (1985). See also ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 15-20 (3d ed. 1982) (explaining that the felony-misdemeanor distinction depends partly on "moral turpitude").

179. The "eggshell skull" rule, which holds that a defendant is liable even for injury which is caused by some pre-existing susceptibility in the plaintiff, is best understood as a way of putting into practice the principle that there are no degrees of negligence. See *infra* text accompanying notes 255-59. Miller uses the eggshell skull (or, as he calls it, the "thin-skull") rule as an example of the inconsistency of concerns about proportionality in the context of mental injury. Miller, *supra* note 64, at 34-35.

Rather, tort law is a system of compensation, and therefore it should concentrate on the need for compensation, rather than on the effects of compensation. This is not to say that negligence law should or could (or is likely to) concentrate solely on the needs of plaintiffs, for the fault requirement is as deeply ingrained as the compensation principle. The point is that fault has always been (officially, at least) a black-and-white concept, even though in reality there may be shades of grey on either side of the negligence line. That being the case, concerns about disproportionate liability have no place in tort law, and indeed sound quite hollow, especially if they lead to the conclusion that a deserving plaintiff is denied recovery against a tortfeasor.¹⁸⁰

Of course, it is conceivable that courts could develop the analytical tools for balancing liability and culpability. They could abandon either the principle that compensation must restore the plaintiff to his or her former position, or the principle that money damages are the only available remedy. Standards would have to be found for measuring culpability; such standards would have to be somewhat vague, but need not be any vaguer than those already applied to establish breach of duty or to assess damages for pain and suffering. However, unless and until the law is willing to take such steps, disproportionate liability is no reason to exclude a whole class of claims, nor even to place limitations on recovery. Unless the limitations are closely tied to the balance between liability and culpability, are designed for the express purpose of achieving that balance, and are in fact effective in achieving the balance, they will be completely arbitrary¹⁸¹ and unjust.¹⁸²

There is also something of a paradox to disproportionality arguments, which can be illustrated with the post-accident care limitation discussed above.¹⁸³ That limitation states that a plaintiff cannot recover for mental injury occasioned by the stress of caring for a physically injured person, and purports to be based on considerations of causal proximity. If such injury is not causally proxi-

180. Miller suggests that the real problem is that mental injury claims compound an already existing disproportionality problem that is created by the eggshell skull rule. *Id.* at 35.

181. Richard N. Pearson defines "arbitrary" in the following way: "A rule of law may be arbitrary with respect to policy either because it is unsupported by any policy, or because it goes farther than, or not as far as, its underlying policy would suggest." Pearson, *supra* note 32, at 478. A rule of the kind discussed in the text would fall into the latter category.

182. This observation can be supported by considerations of changes in social organization. As the Supreme Court of Pennsylvania said in 1975: "The more complex and interwoven societal relations become the greater the responsibility one must accept for his or her conduct." *Sinn v. Burd*, 404 A.2d 672, 681 (Pa. 1975).

183. See *supra* part I.E.4.

mate, what this means is that it is likely to be rare. Thus, the restriction does not solve the problem of limitless or disproportionate liability, as the number of claims eliminated must be relatively small. Here is the paradox: the unlikelihood of mental injury caused by caring for a physically injured person (which is not to say its unforeseeability) makes it easier to exclude liability in such cases, but exclusion will have only a minimal effect in achieving the intended purpose of limiting the number of claims. That minimal effect makes it seem unfair to those individuals who do suffer injury in this way. Their legitimate interests should not be sacrificed for so small a gain.

Neither the impact rule nor the zone of danger rule effectively addresses the proportionality concern. The impact rule was unable to do so, as it did not tie recovery to the degree of tortiousness in the defendant's act, nor to the extent of harm suffered.¹⁸⁴ Lest it be suggested that the impact rule did address proportionality concerns, to the extent that it applied only to negligently-caused harm, and recovery was considerably easier for intentionally-caused harm—that is, where the defendant's act was more morally culpable¹⁸⁵—one should note that a sharp distinction between negligence and intentional torts is hardly a finely-tuned instrument for balancing culpability and liability. Thus, it becomes clear that the impact rule was not really a tool for excluding non-deserving claims. Rather, it was simply a knee-jerk reaction, equating physical touching with physical harm and failing to see the subtleties and complexities of the relationship between the mind and the body.

If the impact rule failed to address proportionality concerns, does the zone of danger rule succeed? Consideration of this question returns us to the shakiness of the foundation for distinguishing between mental and physical injury. If the zone of danger rule is justified on the basis of proportionality, the argument must be that one can easily place a large number of people at risk of mental injury with a single act of negligence, but the number of people placed at physical risk will always be smaller. Modern technology, however, allows some defendants to place huge numbers of people in *physical* danger with one single act of negligence. We need only

184. It is perhaps not so surprising that this is the case, since concerns about disproportionate liability appear to be a more modern phenomenon.

185. Intentionally caused harm is subject to a separate set of rules, which are beyond the scope of this article.

consider mass tort cases such as Agent Orange,¹⁸⁶ the Dalkon Shield,¹⁸⁷ and DES¹⁸⁸ to see that this is true. Mass injury situations contrast sharply to a quiet suburban street where a person witnesses another individual run down by a negligent driver. If courts were really concerned about limiting liability on the basis of a proportionality principle, they would introduce special rules limiting recovery in mass injury, on the basis that many people are in a position to suffer an injury from a single act of negligence. Thus, mass tort claims would be disfavoured simply by reason of the vast numbers of people affected, or potentially affected. On the same analysis, the plaintiff who suffered mental injury as a result of witnessing an accident on a busy city street would be disfavoured compared to one who saw an identical accident on a quiet country road. The outlandishness of these suggestions should suffice to show that unlimited liability is not the real problem. Rather, the attitude underlying restrictive recovery rules such as the zone of danger rule is simply one that privileges physical injury over mental injury.¹⁸⁹

We do not see special restrictive liability rules for situations of mass physical peril, based on the large numbers of people potentially affected. We would expect to see such rules if disproportionality were a general concern of the law, so it begins to look as if it is really an after-the-fact justification for restrictions on recovery for mental injury which are in fact based on some other consideration. In Part III, I give some suggestions as to what those considerations might be.

186. Agent Orange was a defoliant which was proven to cause cancer in Vietnam veterans. See generally Robert L. Rabin, *Tort System on Trial: The Burden of Mass Toxics Litigation*, 98 YALE L.J. 813 (1989).

187. The Dalkon Shield was an unsafe contraceptive device which caused pelvic inflammatory disease and other complications in women who used it. See generally Judge Miles Lord, *The Dalkon Shield Litigation: Revised and Annotated Reprimand by Chief Justice Miles W. Lord*, 9 HAMLINE L. REV. 7 (1986).

188. DES was a drug marketed to pregnant women from the late 1940s to the early 1970s. It caused cancer of the reproductive tract and other complications in the daughters of the women who took it. See generally David A. Fischer, *Products Liability—An Analysis of Market Share Liability*, 34 VAND. L. REV. 1623 (1981); Glen O. Robinson, *Multiple Causation in Tort Law: Reflections on the DES Cases*, 68 VA. L. REV. 713 (1982).

189. See Goodhart, *supra* note 52, at 22 ("It has been difficult for the courts to rid themselves of the idea that in some way or other the shock which the person has suffered must be connected with some pre-existing physical injury or danger . . ."); Finneran, *supra* note 34, at 220 (noting a "theoretically untenable" gap between recognition of mental integrity as a legally protected interest and (non-) recognition of the different ways in which that interest can be invaded).

D. Floodgates

The "floodgates" argument, well known to all lawyers,¹⁹⁰ is generally suspect and should not be applied to exclude liability in this or any other context.¹⁹¹ Professor A.L. Goodhart likened the argument to the principle "that you should not act justly now for fear of raising expectations that you may act still more justly in the future—expectations which you are afraid you will not have the courage to satisfy."¹⁹² Goodhart comments:

[L]awyers are inclined to speak of "opening a wide field," which they tend to regard with some alarm. It is difficult to see why, if the field should prove to be a fertile one, this process should be considered with such disfavour. On the other hand, if it should prove, as is generally the case, only of limited extent, then the exaggerated fears have been unnecessary.¹⁹³

In other words, there is something rather peculiar about denying compensation to a plaintiff on the basis that many other people suffer, or are likely to suffer, the same injury.¹⁹⁴ To mix metaphors for a moment, there cannot be a flood of litigation without an inferno of negligence—yet it seems that when the floodgates argument prevails, the idea is that a defendant who injures many people, or who is in a class that injures many people, should be excused for that very reason.¹⁹⁵

This aspect of the floodgates argument is rarely, if ever, recognized by the courts. They tend to concentrate more on the administrative aspects of the situation; their apprehension appears to be

190. See *Negligently Inflicted Mental Distress*, *supra* note 36, at 1244.

191. See generally Calandrella, *supra* note 41.

192. Goodhart, *supra* note 52, at 14 (citing CORNFORD, *MICROCOSMOGRAPHIA* 15 (4th ed. 1949)).

193. *Id.* The "field" was expressly admitted to be "fertile" by Judge Van Voorhis, dissenting, in *Battalla v. State*, 176 N.E.2d 729, 732 (N.Y. 1961); this was, in Van Voorhis' opinion, a reason not to abandon the impact rule. For instances of courts generally disapproving of the floodgates argument, see *Williams v. Baker*, 572 A.2d 1062, 1067 (D.C. Cir. 1990); *Blackwell v. Oser*, 436 So. 2d 1293, 1297 (La. Ct. App. 1983); *Sinn v. Burd*, 404 A.2d 672, 680-81 (Pa. 1975); *Gain v. Carroll Mill Co.*, 787 P.2d 553, 559 (Wash. 1990) (Brachtenbach, J., concurring only in the result and otherwise dissenting); *Gates v. Richardson*, 719 P.2d 193, 197 (Wyo. 1986).

194. In *D'Ambra v. United States*, 338 A.2d 524 (R.I. 1975), the Supreme Court of Rhode Island reasoned in just the opposite way:

The modern trend of urbanization and overall increase in density of population make serious invasion of our psychological security more and more likely. Where there is a widespread need for redress, the judicial system should consider very carefully before it undertakes to reject, as a matter of law, an entire class of claims.

Id. at 529.

195. See Goodhart, *supra* note 52, at 23. This same observation could be applied to proportionality arguments, insofar as they are based on the apprehension that many people may be affected by an act of negligence.

that there will be more claims than they can deal with.¹⁹⁶ Courts that experience this apprehension do not appear to realize that unjust rules which are out of step with social standards are more likely to give rise to litigation, because the legal profession and society at large will feel such dissatisfaction with them that attempts will be made time and time again to have them overturned. A clear rejection of restrictive liability rules, on the other hand, may in fact reduce the volume of litigation before the courts, because defendants will not take the trouble to litigate and will be more inclined to settle.¹⁹⁷

In any event, it has been rightly argued that the business of courts is to entertain litigation, and it is an abdication of the judicial function to turn deserving plaintiffs away on the basis that they may belong to a large class.¹⁹⁸ Another argument is that even if the courts may be swamped by litigation, it is still better to place the burden on the defendant (or, in most cases, its insurer) than on an innocent plaintiff.¹⁹⁹

As to Goodhart's second point—that "if [the field] should prove . . . only of limited extent, then the exaggerated fears have been unnecessary"—although courts rejecting the *Dillon* approach have

196. See William L. Crowe, Sr., *The Anatomy of a Tort—Greenian, as Interpreted by Crowe Who Has Been Influenced by Malone—A Primer*, 22 LOY. L. REV. 903, 907 (1976).

197. Harvey Teff, for example, notes that the strain of reliving the experience over and over again in the course of litigation would discourage many people, that potential claimants may get medical advice against pursuing a claim, and furthermore that:

the "secondary" nature of the nervous shock in question suggests that this is an area where claims-consciousness and social expectations of redress are unusually weak. Nor is it far-fetched to speculate that where the relationship with the accident victim is very close some people would perceive litigation on their own behalf as inappropriate and distasteful—in extreme cases as a kind of betrayal or negation of their feelings for the primary victim.

Teff, *supra* note 63, at 111-12.

198. See *Barnhill v. Davis*, 300 N.W.2d 104, 106 (Iowa 1981); *Falzone v. Busch*, 214 A.2d 12, 16 (N.J. 1965) ("the proper remedy is an expansion of judicial machinery, not a decrease in the availability of justice"); *Schultz v. Barberton Glass Co.*, 447 N.E.2d 109, 111 (Ohio 1983); *Robb v. Pennsylvania R.R.*, 210 A.2d 709, 714 (Del. 1965). See also Pearson, *supra* note 32, at 506 (noting that the California court "reacts to any argument not going to the substantive merits as an attack on its 'judghood,' as an accusation that, were it to accept the process argument, to that extent it could not dispense justice"); KEETON ET AL., *supra* note 33, at 360; Teff, *supra* note 63, at 111 (noting that the reactions of the Law Lords to the floodgates argument in *McLoughlin v. O'Brian*, 1983 App. Cas. 410 (1982) (appeal taken from Eng. C.A.), ranged from "fairly scathing" to "skeptical" to "equivocal").

199. *Marchand v. Superior Court*, 246 Cal. Rptr. 531, 552 (Ct. App. 1988); *D'Ambra v. United States*, 338 A.2d 524, 530 (R.I. 1975). See also KEETON ET AL., *supra* note 33, at 360.

expressed concerns about the floodgates,²⁰⁰ the California experience appears to show that such concerns are misplaced.²⁰¹ There are probably several reasons for this, including the fact that mental injury claims are often settled rather than litigated, limitations built into the *Dillon* approach²⁰² (especially the physical manifestation requirement, which means that such injury is relatively rare), and subsequent restrictive application of *Dillon* in California.²⁰³ These general problems with the "floodgates" argument must lead us to ask, even if a rule does stem the tide of litigation—as, for example, the impact rule has the capacity to do, by excluding large numbers of claims²⁰⁴—what is the price to logic and principle of achieving that end?

Another variation on the "floodgates" argument is that allowing recovery for mental injury will leave the courts with no logical stopping place.²⁰⁵ The immediate reaction to such an argument must be that if there is no logical stopping place then there should be no stopping place. In other words, we should not take it for granted that there must be a stopping place at all, if there are people in need of compensation and people who have negligently in-

200. See *Stadler v. Cross*, 295 N.W.2d 552, 555 (Minn. 1980); *Tobin v. Grossman*, 249 N.E.2d 419, 424 (N.Y. 1969).

201. *Corso v. Merrill*, 406 A.2d 300, 306 (N.H. 1979); *Ramirez v. Armstrong*, 673 P.2d 822, 826 (N.H. 1983). See also KEETON ET AL., *supra* note 33, at 360; Golden, *supra* note 36, at 658. If Goodhart is correct, even the evidence of the Californian experience is unnecessary to reach the conclusion that the zone of danger rule does not stem any tide. See Goodhart, *supra* note 52, at 23.

202. See *supra* notes 60-64 and accompanying text.

203. See *supra* text accompanying notes 69-80.

204. But see *McNiece*, *supra* note 30, at 30-31 (claiming that the impact rule is unable to stem the tide of litigation).

205. See, e.g., *Amaya v. Home Ice, Fuel & Supply Co.*, 379 P.2d 513, 522-24 (Cal. 1963); *Williams v. Baker*, 572 A.2d 1062, 1070-71 (D.C. Cir. 1990); *Rickey v. Chicago Transit Auth.*, 457 N.E.2d 1, 4 (Ill. 1983); *Stadler v. Cross*, 295 N.W.2d 552, 554 (Minn. 1980); *Corso v. Merrill*, 406 A.2d 300, 309 (N.H. 1979) (Grimes, J., dissenting); *Tobin v. Grossman*, 249 N.E.2d 419, 422-23 (N.Y. 1969); *Jelley v. LaFlame*, 238 A.2d 728, 730 (N.H. 1968); *Lafferty v. Manhasset Medical Ctr. Hosp.*, 429 N.E.2d 789 (N.Y. 1981); *Battalla v. State*, 176 N.E.2d 729, 733 (N.Y. 1961) (Van Voorhis, J., dissenting); *Niederman v. Brodsky*, 261 A.2d 84, 90 (Pa. 1970) (Bell, C.J., dissenting); *Waube v. Warrington*, 258 N.W. 497, 501 (Wis. 1935). See generally Leon Green, *The Duty Problem in Negligence Cases*, 28 COLUM. L. REV. 1014, 1035 (1928) (explaining why courts are concerned with the workability of a principle); *Henderson*, *supra* note 63, at 517 ("both the impact and the zone-of-danger rules serve . . . the process function of accomplishing . . . limitations in a sufficiently formal manner to render the negligence concept adjudicable"). Such arguments have been rejected on numerous occasions. See, e.g., *Marchand v. Superior Court*, 246 Cal. Rptr. 531, 545 (Ct. App. 1988); *Barnhill v. Davis*, 300 N.W.2d 104, 106 (Iowa 1981) (citing *Dillon v. Legg*, 441 P.2d 912, 920 (Cal. 1968) (stating that the "case-by-case approach of the common law is best suited to refine the rules"); *Dziokonski v. Babineau*, 380 N.E.2d 1295, 1302 (Mass. 1978); *Sinn v. Burd*, 404 A.2d 672, 683 (Pa. 1979) ("We find this attempt to resort to the logical 'gimmick' of *reductio ad absurdum* to be of little value.").

jured them. At the same time, the use of such an argument invites us to examine restrictive recovery rules to see whether they provide a logical stopping place themselves. Thus, we might consider whether any of the rules applied to mental injury really do represent a bright line, or whether they leave significant leeway to judges and juries.

The impact rule, while appearing to be mechanical and easy to apply, is in fact anything but. Although the word "impact" has a ring of the black and white about it, cases involving smoke inhalation or dust in the eye²⁰⁶ show that the rule in practice allowed recovery in situations we would not normally think of as "impact."²⁰⁷ It is clear that courts have applied the rule in a very permissive way; the more permissive the application, however, the further the courts were from effectuating the stated purpose of the rule.²⁰⁸

Similar observations can be made about the zone of danger rule. Once again, an apparently mechanical, easy to apply rule based on physical realities is in fact one of rather indeterminate application. Consider the following example, taken from one of the most famous cases in this area: a mother sitting on the front porch of her house sees a negligent driver run down her daughter, who is crossing the street.²⁰⁹ The mother is assumed to be outside the zone of danger, by virtue of the fact that she was not on the street. However, it is not unknown for negligent drivers to run off the street and into houses or buildings.²¹⁰ Thus, it is easy to see how a plaintiff in such a position could fear for herself even though, in hindsight, she was never really in danger.

More to the point, reasonable minds might disagree on the question of just how far the zone of danger extends. A good illustration of this problem is the case of *Portee v. Jaffee*,²¹¹ where the plaintiff watched her son suffer and die while trapped in an elevator

206. See *supra* text accompanying notes 38-39.

207. One situation which I have not been able to find in a reported case applying the impact rule, but which would pose an interesting challenge to that rule, is where the plaintiff was splashed by the blood of a person physically injured in an accident caused by the defendant's negligence. Certainly, being splashed with blood would be a more horrific experience than simply witnessing the accident, and to that extent injury becomes more easily foreseeable, but would the courts deny recovery on the basis that the blood was not the defendant's property?

208. See *infra* text accompanying notes 36, 40.

209. *Dillon v. Legg*, 441 P.2d 911 (Cal. 1968).

210. See, e.g., *Strazza v. McKittrick*, 156 A.2d 149 (Conn. 1959); *Bowman v. Williams*, 165 A. 182 (Md. 1933); *Paugh v. Hanks*, 451 N.E.2d 759 (Ohio 1983); *Dulieu v. White & Sons*, 2 K.B. 669 (1901) (horse and cart, rather than automobile); *Hunsley v. Giard*, 553 P.2d 1096 (Wash. 1976).

211. 417 A.2d 521 (N.J. 1980).

shaft in the building in which they lived. Where the danger created by the defendant consists of some sort of trap, any given person's presence in the "zone of danger" depends on his or her actions, not on those of the defendant. Thus, the "zone of danger" is infinite in one sense, and in another sense responsibility can be shifted to the plaintiff for placing him- or herself in it.²¹²

The foregoing discussion shows that the law relating to mental injury occasioned by physical harm to another rarely if ever lives up to the policy considerations which supposedly underlie it. The restrictive recovery rules imposed have not necessarily excluded trivial claims, averted fraud, ensured that liability is proportionate to moral culpability, or stemmed the tide of litigation. To the extent that they have achieved one of these latter two aims, there are strong grounds to argue that it is not the business of tort law to be seeking to do so in the first place. One must conclude that the law relating to mental injury occasioned by harm to another is in a rather sorry state from the point of view of policy. Before offering my own explanation for how courts allowed this to happen, I turn to consider the law from the point of view of general tort doctrine.

III. The Inconsistency of the Rules with General Tort Doctrine

In this part, I consider the relationship between the rules that restrict recovery for mental injury occasioned by physical harm to another and the general principles of tort law. First, I demonstrate how the formation of restrictive liability rules has distorted the concept of a duty of care without a convincing reason for the distortion. I then discuss considerations of causal proximity and remoteness that have been used to justify restrictive liability rules, and suggest that the tension between these concerns and the principle that a tortfeasor is liable for all injury suffered as a result of his or her negligence should instead be resolved in favour of the plaintiff. My conclusion is that the law of mental injury occasioned by physical harm to another is at best a major exception to general tort principles, and at worst incoherent and inconsistent with established doctrine.

A. Duty and Foreseeability

Application of a duty analysis is the most common way courts resolve issues arising out of mental injury occasioned by the death

212. See Havard, *supra* note 6, at 492-93.

of or by injury to a loved one of the plaintiff.²¹³ If recovery is to be denied, it is generally on the basis that the defendant owed the plaintiff no duty of care.²¹⁴ Thus, most restrictions on recovery are, formally at least, an answer to the question: was the relationship between the parties such that the law imposes a duty on the defendant to avoid injuring the plaintiff?²¹⁵ This, of course, is a question that must be answered in all negligence cases. However, something other than the usual analysis is applied in the area of mental injury. The core concept of foreseeability has been distorted or ignored in a way that suggests that courts' concerns about mental injury go deeper than is commonly intimated. Duty is a question of law,²¹⁶ which means that if the plaintiff fails to establish the defendant's duty, he or she will not have the opportunity to present a case to a jury. Treating mental injury as a question of duty, therefore, enables judges to keep control over the cause of action, and to pursue any policy aims which they might consider important.

Of course, it is clear that considerations other than foreseeability have always been taken into account in establishing or denying a duty, in this and many other contexts.²¹⁷ The reasons for recognizing and applying policy limitations in the course of the duty inquiry vary depending on the context, but the policies involved here are probably the same as those that were formerly used to justify failure to recognize this type of injury, and are subject to the same counter-arguments.²¹⁸ Close consideration of the rules that have purported to recognize a duty in respect of mental injury shows that something different from a traditional doctrinal approach has been taken to duty.

213. *But cf.* *Bowen v. Lumbermens Mut. Casualty Co.*, 517 N.W.2d 432, 439 (Wis. 1994). For the *Bowen* court, the inquiry was overtly about public policy rather than duty.

214. An alternative basis for refusing recovery is that the plaintiff has not suffered the requisite type or extent of injury. Most of these rules are discussed from the point of view of policy above. *See supra* part II.

215. *See Henderson, supra* note 63, at 516.

216. *See FLEMING, supra* note 33, at 126 (explaining that the court handles the preliminary determination of whether a duty exists, a decision that carries precedential weight). *See also Jaensch v. Coffey*, 155 C.L.R. 549, 581 (Austl. 1984).

217. *See, e.g., Anns v. Merton London Borough Council*, 1978 App. Cas. 728 (1977) (appeal taken from Eng. C.A.) (liability of statutory authorities); *Rondel v. Worsley*, [1969] 1 App. Cas. 141 (1967) (appeal taken from Eng. C.A.) (barristerial immunity). *See also supra* note 90 and accompanying text.

218. *See supra* parts I.A and II.

1. The Zone of Danger Rule

The zone of danger rule distorts the duty inquiry because it ignores the nature of the injury, delineating a duty in respect of mental injury that is coextensive with the duty in respect of physical injury.²¹⁹ A defendant who physically endangers a plaintiff is clearly in breach of a well-established duty, and the only remaining element of the tort of negligence to be established is injury flowing from the breach. Thus, the advance the zone of danger rule made over the impact rule related to recognition of the injury and to the way it came about, not to duty as such. It is easy to see how the zone of danger rule relates to foreseeability in a near-miss case, where the plaintiff was concerned only for his or her physical safety. In such a case, endangerment is indeed the gist of the action.²²⁰ However, neither the strong nor the weak version of the rule establishes anything at all about the foreseeability of injury in the case of mental injury resulting from fear of harm to a third person.

Under the strong version, the plaintiff must have feared for him- or herself; therefore, claims relating to fear for another person are automatically excluded even if they were foreseeable. It may, of course, be said that medical knowledge establishes that mental injury arising out of fear for oneself is more normal, hence more likely, hence more foreseeable.²²¹ However, it is important to bear in mind that the foresight with which we are concerned is that of the reasonable man, who is not a doctor.²²² Medical evidence is only useful insofar as it can establish the genuineness or otherwise of the injury (either generally or in any particular case) or throw light on the factual causation issue. If the reasonable person recognizes that injury may arise out of fear for another, it is obvious that such recognition cannot be based on the plaintiff's own physical endangerment.

If the weak version of the zone of danger rule is applied, such that recovery is allowed wherever the plaintiff might reasonably have feared for him- or herself, even if the plaintiff's fear was in fact for another person, the rule in effect denies the foreseeability of that which it uses to ground the duty. On the one hand, the rule says that mental injury is only foreseeable if it arises out of danger

219. See *supra* notes 56-59 and accompanying text.

220. See Brody, *supra* note 36, at 239.

221. See generally Smith, *supra* note 155; Havard, *supra* note 6.

222. See KEETON ET AL., *supra* note 33, at 182-85 (discussing the fact that the reasonable man is only required to have the usual amount of knowledge). But see *id.* at 185-93 (discussing higher standards imposed in some cases, e.g., medical malpractice); FLEMING, *supra* note 33, at 98-99.

to oneself, and on the other hand, it allows claims based on injury arising out of fear for another. Given the absurdity of this logic, one must conclude that the weak version of the zone of danger rule is not about foreseeability at all.

Thus, neither version of the zone of danger rule is consistent with the notion that a duty of care in negligence is based on the foreseeability of harm to another, if by "harm" we mean that harm that is actually being compensated.

2. The *Dillon* Approach

The *Dillon* case was the first attempt in the United States to apply a traditional duty analysis to mental injury, but the ultimate effect of that case has been to keep mental injury in a class of its own and subject to additional rules compared to other types of injury.²²³ Plaintiffs whose mental injury is occasioned by harm to another are treated as "bystanders" whereas plaintiffs whose mental injury has come about in another way are "direct victims" and have a considerably easier time in establishing their entitlement to recovery. In particular, "direct victims" are not required to satisfy the three "proximity" criteria laid down in *Dillon*.²²⁴ In this sense, *Dillon* stopped short of recognizing a duty of care in respect of mental injury and recovery is still the exception rather than the rule.²²⁵ The case did bring the law one step closer to recognizing a general duty in relation to mental injury in that it admitted that mental injury occasioned by fear for another person is foreseeable under certain circumstances. On the other hand, and in addition to the conclusions to be drawn from a comparison with the direct victim cases, it can be argued that the criteria laid down in *Dillon* cannot be justified on the basis of any help they provide in establishing the foreseeability of the injury.

The *Dillon* approach is, on the whole, far better than the zone of danger approach in ensuring that mental injury victims are not treated differently from those who suffer other kinds of injury. It evidences a conviction in favour of taking mental injury seriously in that it applies legal concepts in a manner consistent with that in which those concepts are applied in other contexts. Leaving aside problems relating to the strictness with which the *Dillon* criteria have been applied,²²⁶ it can generally be said that the *Dillon* approach successfully resolves the duty question in mental injury

223. See *supra* note 62 and accompanying text.

224. See *supra* text accompanying notes 69-79.

225. See *supra* text accompanying notes 84-85.

226. See *supra* note 64 and accompanying text.

cases by treating the injury as foreseeable. It does not, however, go all the way towards squaring the law relating to mental injury occasioned by harm to another with general tort law.

As discussed above, one aspect of the *Dillon* approach is to require plaintiffs to show that the defendant is also liable to the physically injured person. Thus, where the defendant has a defence, or perhaps even a partial defence, against the physically injured person, the mentally injured person cannot recover.²²⁷ This rule represents yet another example of how a general duty of care in relation to mental injury has not been recognized. If there were such a duty, we would not expect to see liability depending on things that have nothing to do with the relationship between the plaintiff and the defendant.²²⁸ Thus, we see once again that courts following the *Dillon* approach do not necessarily recognize an independent duty to the relatives of the people one's negligence physically endangers.²²⁹ If such a duty were recognized, it would have to be admitted that a person suffering mental injury does not simply "tack" his or her cause of action onto the cause of action of the person who was killed or physically injured.²³⁰ The mental injury victim's action would stand or fall on its own merits. The duties owed to the two people are interdependent, certainly; but the most analytically sound approach to this interdependence is to say that *by endangering one person, a defendant is being negligent towards that person's relatives*. This gives rise to a duty which is independent in its own right.

If a case arises, then, where the physically injured person is guilty of some contributory negligence, the best way of dealing with it would be to treat the defendant and the physically injured person as joint tortfeasors. There would then remain scope for adjusting rights and liabilities between those two people in whatever way is provided for by the law of the jurisdiction. Matters should be settled as in any joint tortfeasor case, and the plaintiff should not be disadvantaged because he or she has been injured by the combined negligence of two people or singled out because one of those people was also being negligent towards him- or herself. The injury is the same and the need for compensation is the same; relative culpabil-

227. See *supra* part I.E.5.

228. Teff comments that "underlying the unease with which courts have both made and withheld awards, can sometimes be detected a certain ambivalence about compensating people who, however deserving, are in one sense 'secondary' victims of tortious conduct." Teff, *supra* note 63, at 104.

229. See Createo, *supra* note 61, at 67 (suggesting that this limitation is conceptually inconsistent with the rest of the court's analysis).

230. See Stone, *supra* note 126, at 789-90.

ity and liability should be fought out between those who have been negligent.²³¹ For example, the defendant might be liable for the whole of the plaintiff's damages and retain the right to sue the third person for a contribution.²³²

3. The Australian Proximity Approach

The approach introduced in *Jaensch v. Coffey*²³³ is also a viable alternative to mechanical rules, and maximizes flexibility, which is the greatest strength of the common law. Perhaps, however, this approach's capacity to maintain flexibility is best explained by the fact that it does nothing different from that which the application of traditional tort principles would do. There is, however, scope for criticizing the whole concept of proximity as a superadded criterion beyond foreseeability.

It is easy to see how a concept like "proximity" sounds germane to the question of mental injury occasioned by injury to a third person. The closeness of the relationship between the plaintiff and the third person is obviously a key consideration, but what Justice Deane did not appear to recognize, at least in his general discussion of the meaning of proximity,²³⁴ is that proximity is a key consideration for foreseeability. A concept like "proximity" cannot provide any answers to difficult duty questions because it raises a question itself: *how proximate?* The answer, of course, is, "proximate enough to be foreseeable." This answer brings us back to the beginning if we, like Justice Deane, are determined not to regard foreseeability as a "panacea."²³⁵ Unless the proximity inquiry reduces to one of foreseeability, it is difficult to see how a thing like

231. See generally KEETON ET AL., *supra* note 33, ch. 8.

232. This, however, depends on whether the third person is liable to the plaintiff. Do I owe a duty to my friends and relatives not to injure myself? In *Jaensch v. Coffey*, Justice Deane suggested in dicta that a defendant who causes mental injury to another by inflicting injury upon herself is not liable. Unfortunately, Justice Deane made only a passing reference to this issue, and so we are left to wonder about the basis for such a position. *Jaensch v. Coffey*, 155 C.L.R. 549, 604 (Austl. 1984). It can certainly be argued that, if there is such a thing as a duty to avoid causing mental injury without impact or physical endangerment, recovery should not be automatically excluded in such a situation. A similar sentiment, though not expressed, might go some way to explaining the decision in the Australian case of *Rowe v. McCartney*, [1976] 2 N.S.W.R. 72. See *supra* part I.E.6.

233. 155 C.L.R. 549 (Austl. 1984). See *supra* text accompanying notes 86-103.

234. See *supra* text accompanying notes 95-96. It must also be noted, of course, that the idea of a relationship between the plaintiff and a third person did not come into his explanation of the meaning of "proximity."

235. *Jaensch*, 155 C.L.R. at 581. Julius Stone, in a scathing attack on "this further new-fangled bifurcation," argued that it "would submerge this whole area of the law in an ocean of raging chaos." JULIUS STONE, PRECEDENT AND LAW: DYNAMICS OF COMMON LAW GROWTH 264-65 (1985).

proximity can be measured.²³⁶ "Proximity" begins to sound like nothing more than a convenient label for the result of some process in the judge's mind, which may involve nothing more than random ruminations on justice and equity.

This is not to say that ruminations on what appears just are simply out of place in this context; indeed, they may be the only possible way of arriving at a satisfactory conclusion. Whatever the content of the proximity principle, its application in *Jaensch* did lead to a satisfactory result.²³⁷ However, the proximity approach, much as it has the ability to lead to satisfactory results, gives no real assistance in understanding the problem of mental injury occasioned by the death of or by injury to another person. It does not give voice to courts' real concerns about this type of injury: that the injury is trivial, that there is a danger of fraudulent claims, that liability will be disproportionate to fault, and that there is a danger of a flood of claims. The proximity approach appears to incorporate those concerns, but subsuming them under the banner of proximity gives practitioners and commentators no opening for analysis or argument. In short, proximity is a conclusion, not a test. It would be preferable for the courts to award damages on the basis of sympathy for the plaintiff or their assessment of his or her "deservingness"; it is entirely likely that this is what they do in any event.

Thus, the proximity test does not and cannot solve the problem of mental injury occasioned by harm to another person. It shows, like the *Dillon* approach, that even when courts purport to apply general legal principles to mental injury, that injury is still treated as an exceptional category of damage. It has at its base an assumption that mental injury should be disfavoured. Therefore, while Justice Deane's approach is preferable to the application of mechanical rules, the judgment is yet another example of the need that common law judges seem to feel to find ways to justify a restrictive approach to mental injury. We have not, as yet, discovered a convincing rationale for that need.

One restriction remaining after *Jaensch v. Coffey* is the proposition that there can be no recovery for mental injury occasioned by the defendant's self-inflicted harm.²³⁸ This translates, analytically,

236. It is on this ground that Justice Gerard Brennan continues to reject the "proximity" approach. See *San Sebastian Proprietary Ltd. v. Minister Administering Envtl. Planning & Assessment Act 1979*, 162 C.L.R. 340, 367-68 (Austl. 1986).

237. That is, the injured woman recovered and there was a general opening-up of the area based on a recognition that mental injury is likely to be a product of a close relationship. It may be questioned whether the results to which it leads are any different from those which would be reached by a straight foreseeability test.

238. See *supra* text accompanying note 232.

into something very similar to *Dillon's* requirement that the defendant be liable to the third party.²³⁹ One of the biggest risks for a plaintiff under the *Dillon* approach is that it will be found that the third party was contributorily negligent. Self-inflicted injury is a case of one hundred percent contributory negligence. Therefore, under either the *Jaensch* approach or the *Dillon* approach, mental injury occasioned by the defendant's self-inflicted injury is not recoverable. For this reason, the same criticisms may be directed against the Australian rule as against the Californian: there is no analytical distinction between endangering another person and endangering oneself, once one recognizes the deservingness of a plaintiff who has suffered mental injury occasioned by harm to another. If, as argued above,²⁴⁰ a contributorily negligent third party can be treated as a joint tortfeasor in relation to the mental injury plaintiff, there should be no reason why one should not have a self-injuring defendant. The Australian reservation in relation to self-inflicted injury, therefore, shows that the High Court has still not fully recognized the foreseeability of mental injury occasioned by physical harm to another.

B. Remoteness, Proximate Cause and the Eggshell Skull Rule

Another stage of the negligence inquiry where litigants in mental injury cases may encounter difficulties is that of "remoteness of damage" or "proximate cause." Although most courts and commentators consider the issue of mental injury as one to be solved at the duty stage, it is necessary to consider how remoteness and proximate cause apply to mental injury. This is because of lingering concerns about the abnormality of any plaintiff who suffers serious mental injury as a result of harm to another person: remoteness and proximate cause speak directly to these concerns.

The United States, England and Australia all have rules about the connection between the negligence and the injury which go beyond a simple inquiry as to factual causation. The United States "proximate cause" formulation requires that the consequences of the defendant's negligence must be within the risk it created,²⁴¹ a direct consequence of the risk,²⁴² or "foreseeable" before

239. See *supra* parts I.E.5 and III.A.2.

240. See *supra* part I.E.5.

241. See KEETON ET AL., *supra* note 33, at 281-82.

242. See *id.* at 293-96.

recovery will be allowed.²⁴³ The term is also used to cover situations involving an intervening cause.²⁴⁴

In England and Australia, on the other hand, intervening causes are generally thought of as a question of "legal causation," whereas "remoteness of damage" is a separate question.²⁴⁵ The general rule in these jurisdiction is that that the damage complained of is of the same kind as that which could be foreseen, rather than paying attention to the chain of events which led to the damage. The case laying down this rule was *Overseas Tankship (UK) Ltd. v. Morts Dock & Engineering Co.*,²⁴⁶ commonly referred to as *The Wagon Mound (No. 1)*, whose facts give a good illustration of the approach.

In *The Wagon Mound*, the defendant negligently caused an oil spill on Sydney Harbour, which spread to the plaintiff's dock where welding operations were being carried out. An employee of the plaintiff made inquiries to the defendant about the safety of continuing welding, and was assured that the flash point of the oil was sufficiently high that it could not be set alight by the sparks that would be given off. No one knew exactly how the fire started, but it was assumed that a spark must have set alight a piece of cotton or some similar material, which fell on the water and acted as a wick, igniting the oil. The dock was destroyed. The Privy Council held that the only foreseeable damage from the oil slick was soiling or fouling from contact between the oil and the dock, not damage by fire. Burning and fouling being two different types of damage, the plaintiff could not recover.

The *Wagon Mound* rule, like American proximate cause rules, is supported by the apprehension that liability may exceed culpability.²⁴⁷ However, once again we find that on examination neither type of rule necessarily addresses this concern effectively.²⁴⁸ Rules relating to directness or the foreseeability of a certain type of damage do not necessarily tie liability to culpability. An act of minor negligence may foreseeably or directly cause widespread damage, and an act of gross negligence may foreseeably or directly cause only minor damage. The outbreak of fire at Morts Dock did not sud-

243. See *supra* notes 65-67 and accompanying text. See also *Leong v. Takasaki*, 520 P.2d 758 (Haw. 1974) (applying a "proximate cause" approach to the entire issue of mental injury).

244. See KEETON ET AL., *supra* note 33, at 301-19.

245. But see *Medlin v. State Gov't Ins. Comm'n*, 182 C.L.R. 1 (1995) (Austl.); *Nader v. Urban Transit Auth.*, 2 N.S.W.L.R. 501, 530-31 (Austl. 1985) (suggesting that "legal causation" is simply part of the remoteness inquiry).

246. 1961 App. Cas. 388 (P.C.) (appeal taken from N.S.W.).

247. *Id.* at 422-23. See generally KEETON ET AL., *supra* note 33, at 287.

248. See *supra* part II.C.

denly make the defendant's oil spill less negligent. Nor does the onset of a mental illness in the wake of a family tragedy make the behaviour of the person who caused the tragedy any less blameworthy. It is therefore clear that such rules are ultimately arbitrary.²⁴⁹

There is also the argument that such rules give effect to some people's feeling that liability must stop somewhere.²⁵⁰ If that is the case, it must be asked what they do that cannot be done in the course of the duty inquiry.²⁵¹ If the remoteness question were put to a jury and the duty question were decided by a judge, there is much to be said for the proposition that decisions should be based on the instinctive feelings of the former rather than the latter.²⁵² However, remoteness or proximate cause is usually treated as a legal question²⁵³ and, as such, simply amounts to yet another hole through which an otherwise deserving claim might fall.

Moreover, *The Wagon Mound (No. 1)* leaves open a serious question which becomes very relevant in the context of emotional injury cases: how narrowly is the damage to be categorized? Clearly "damage to property" was a broader category than the Privy Council was willing to recognize, but what of, say, "personal injury"? Would this be parceled up into injuries to different parts of the body? It appears not; cases since *The Wagon Mound (No. 1)* have taken a broad approach to personal injury, with the result that the foreseeability of *any* personal injury makes a defendant

249. See *supra* note 181.

250. See *supra* note 205 and accompanying text.

251. The duty approach was preferred in *D'Ambra v. United States*, 338 A.2d 524, 527 (R.I. 1975) and in *Waube v. Warrington*, 258 N.W. 497, 497-98 (Wis. 1935). For a discussion of the relationship between "proximate cause" rules and the *Palsgraf* doctrine of the unforeseeable plaintiff (which decides the issue at the duty stage), see KEETON ET AL., *supra* note 33, at 284-90. See also West, *supra* note 43, at 189 (arguing that the real question in mental injury cases is one of proximate cause).

252. See *Masaki v. General Motors Corp.*, 780 P.2d 566, 576 (Haw. 1989). See also Brody, *supra* note 36, at 236. It might also be argued that one of the purposes of the tort system is to discourage self-help, and that in order to fulfill this function plaintiffs must be allowed their "day in court" wherever possible. It may or may not be true that plaintiffs who are unsuccessful at the duty stage are likely to go out and, say, vandalize the defendant's property in an effort to seek revenge, but it is submitted that an important factor in recovery from accidents is the opportunity to have one's case against any (perceived) wrongdoer heard by a third person. Resolving the issue at the duty stage denies the plaintiff this opportunity. See Miller, *supra* note 64, at 28. On the other hand, problems with the approach of leaving such questions to juries have been noted. See *D'Ambra*, 338 A.2d at 527-28; Miller, *supra* note 64, at 30-32; Nathan Sidley, *Proximate Cause and Traumatic Neurosis*, 11 BULL. AM. ACAD. PSYCHIATRY L. 197, 200 (1983); *Negligence and Emotional Harm*, *supra* note 55, at 528. But see Smith, *supra* note 155, at 625.

253. See FLEMING, *supra* note 33, at 281-82.

liable for *all* personal injury.²⁵⁴ Indeed, it is difficult to see how the "eggshell skull" rule could survive under any other approach.

However, one cannot help but notice that there is a substantial tension between the eggshell skull rule and the *Wagon Mound* rule when applied to mental injury.²⁵⁵ Consider a situation where the plaintiff has been physically endangered but not struck, and because of a particular sensitivity to fright suffers organic depression, either as a result of fear for him- or herself or as a result of witnessing an injury to another person. If the eggshell skull rule means that damages must be allowed for mental injury irrespective of the plaintiff's pre-existing vulnerability,²⁵⁶ it will be difficult to justify a declaration, in the application of the *Wagon Mound* rule, that only physical injury was foreseeable.²⁵⁷ The eggshell skull rule requires courts to disregard foreseeability, and the *Wagon Mound* rule requires courts to rely on it. Such difficulties do not appear to arise in practice, since it has been held for some time that mental injury is a foreseeable result of fright.²⁵⁸ However, remoteness rules remain a vulnerable link in the chain of liability.²⁵⁹

One good example of this vulnerability is the case of *Rowe v. McCartney*, discussed above.²⁶⁰ The plaintiff in that case failed be-

254. See, e.g., *Smith v. Leech Brain & Co.*, 2 Q.B. 405 (1962); *Beavis v. Apthorpe*, 80 N.S.W.W.N. 852 (1962). The one exception would seem to be *Rowe v. McCartney*, [1976] 2 N.S.W.R. 72. See *supra* text accompanying notes 131-134.

255. See Brody, *supra* note 36, at 255 ("those courts which deny recovery where fright has induced physical consequences on the ground that the fright is an intervening cause between the negligence and the consequences are on even surer ground when the victim is susceptible to emotional distress").

256. That is, assuming the "transformation difficulty" has been overcome. See *infra* text accompanying notes 283-86.

257. See, e.g., *Hevican v. Ruane*, [1991] 3 All E.R. 65 (Q.B.) (finding that plaintiff was entitled to damages for "nervous shock" even though it was not foreseeable that the plaintiff would suffer a continuing illness).

258. See, e.g., *Dulieu v. White*, 2 K.B. 669, 672-75 (1901) ("We must, therefore, take it as proved that the negligent driving of the defendant's servant reasonably and naturally caused a nervous or mental shock to the plaintiff by her reasonable appreciation of immediate bodily hurt."); *Mount Isa Mines Ltd. v. Pusey*, 125 C.L.R. 383, 389 (Austl. 1970) ("[I]t could be held that such an employer could and ought to foresee that the sight of a burning or recently burnt human might mentally disturb an employee whose proximity to the injured fellow employee ought to be foreseen.").

259. It has already been seen that at least one court has categorized mental injury in a narrow way, according to the way it came about, and excluded liability on the basis of a remoteness analysis. See *supra* text accompanying notes 128-33 (discussing *Rowe v. McCartney*, [1976] 2 N.S.W.R. 72). That case is all the more striking for its refusal of even parasitic damages, considering that the plaintiff was physically injured. However, this is certainly a more honest approach than that taken in some of the impact rule cases where the causal connection between physical impact and mental injury was tenuous, to say the least. See *supra* notes 36-40 and accompanying text. On the "flimsiness" of applying a "proximate cause" analysis to exclude recovery under the impact rule, see McNiece, *supra* note 30, at 28.

260. See *supra* text accompanying notes 128-33.

cause her mental injury was caused by irrational guilt and was therefore unforeseeable. The result was based on remoteness, which must mean that mental injury occasioned by guilt is categorized as injury of a different kind from injury occasioned by depression about her own injuries or by the shock of witnessing the defendant's injuries. The application of remoteness analysis in this case was an extraordinary thing in itself. The Court of Appeal of New South Wales clearly erred in categorizing the damage according to the chain of events by which it occurred, for that is the type of analysis from *In re Polemis* that was clearly rejected in *The Wagon Mound (No. 1)*.²⁶¹ The law in Australia since that case was decided has been that damage is considered too remote if it is of an unforeseeable *kind*, not if it was brought about by an unforeseeable chain of events.²⁶²

It is difficult to imagine how an otherwise reputable court could have made such a fundamental error unless there was some other force at work. Perhaps the majority judges were being unconsciously influenced by the peculiarly feminine reaction of the plaintiff.²⁶³ It seems likely that *Rowe* would be overruled today, on the basis of statements made by the High Court of Australia's reaffirmation of approval of *The Wagon Mound (No. 1)* in *Jaensch v. Coffey*.²⁶⁴ However, it still stands as testimony to the inability of some judges to come to grips with the idea that the human mind is not a completely rational machine.²⁶⁵

Similar complications arise in the United States²⁶⁶ where the "directness" approach is used.²⁶⁷ This approach requires a judgment about the events intervening between the negligence and the

261. *Overseas Tankship (UK) Ltd. v. Morts Dock & Eng'g Co.*, 1961 App. Cas. 388 (P.C.) (appeal taken from N.S.W.). For a fuller description of this case, see *supra* text accompanying note 246.

262. See also *Chapman v. Hearse*, 106 C.L.R. 112 (Austl. 1961), where the High Court of Australia rejected the proposition that duty should only be found where the exact chain of events leading to damage was foreseeable. It was on the basis of this case that Glass, J.A., dissented in *Rowe*. See *Rowe*, [1976] 2 N.S.W.R. at 78-79.

263. The plaintiff's reaction was a classic case of the active care, concern, and responsibility described by Carol Gilligan as part of a distinctly feminine form of moral reasoning. See generally GILLIGAN, *supra* note 12.

264. 155 C.L.R. 549, 581, 602-03 (Austl. 1984). It should be noted that the High Court of Australia, unlike the United States Supreme Court, is the ultimate court of appeal for all civil and criminal cases; its pronouncements on the common law are binding on all state courts, irrespective of the origin of the cases in which they were made. It is unlikely that the High Court would have dismissed an appeal by the plaintiff in *Rowe*, if such an appeal had been taken.

265. For further development of this argument, see *infra* part IV.A.

266. See *Negligently Inflicted Mental Distress*, *supra* note 36, at 1257 (observing that in "mental distress cases [the plaintiff's pre-existing] susceptibility is undoubtedly the major policy factor to be dealt with in determining proximate cause").

267. See *KEETON ET AL.*, *supra* note 33, at 297.

injury—their foreseeability, or whether they should be regarded as sufficient to break the chain of causation. The law here is notoriously vague²⁶⁸ and the application of any sort of standard, implicit or explicit or, indeed, of no standard at all, can be envisaged. One can well imagine a declaration that the plaintiff's reaction in a mental injury case, being abnormal, was unforeseeable, or made the causal connection too tenuous, or its results too indirect.²⁶⁹ Another approach would be to treat the plaintiff's "subjective" reaction as an intervening cause.²⁷⁰

The tension between proximate cause and the eggshell skull rule is especially apparent in jurisdictions which adhere to the zone of danger rule.²⁷¹ If liability is predicated at least partly on foreseeability, the zone of danger rule must contain a judgment about what is foreseeable, which, in turn, has been influenced by medical opinion of the time.²⁷² Dr. Hubert Winston Smith was qualified in both medicine and law, and his apparently influential article, *Relation of Emotions to Injury and Disease: Legal Liability for Psychic Stimuli*,²⁷³ explained a medical view of this type of mental injury and made proposals for a legal response. The legal response proposed was to deny recovery on the basis that only abnormal persons would suffer severe and lasting injury as a result of fright.²⁷⁴ Thus, pregnancy is "a temporary idiosyncrasy"²⁷⁵ and any psychic injury

268. See generally *id.* at ch. 7.

269. It has been suggested, for example, that the real cause of the injury is the plaintiff's fright, not the defendant's negligence. See *Johnson v. Jamaica Hosp.*, 467 N.Y.S.2d 634, 641 (App. Div. 1983) (Bracken, J., dissenting). One might also note that there is something of a paradox in the physical manifestation requirement and the "serious injury" requirement if the foreseeability of the injury is a concern: to be recognized, the injury must be serious, but the more serious it is, the more unforeseeable it must be! See *Negligence and Emotional Harm*, *supra* note 55, at 517.

270. See Brody, *supra* note 36, at 244.

271. See *supra* part I.C.

272. It could be observed, however, that there is something peculiar about using the knowledge of doctors or other highly qualified professionals to reach a conclusion about what the "reasonable man" would foresee. However, such an approach seems to be widespread in this field. See, e.g., *Negligently Inflicted Mental Distress*, *supra* note 36, at 1255.

273. See Chamallas & Kerber, *supra* note 9, at 846-851 (discussing Hubert Winston Smith, *Relations of Emotions to Injury and Disease: Legal Liability for Psychic Stimuli*, 30 VA. L. REV. 193 (1944)). Chamallas and Kerber note that Smith's article was relied on in *Amaya v. Home Ice, Fuel & Supply Co.*, 379 P.2d 513 (Cal. 1963), to deny recovery to a bystander mother. See Chamallas & Kerber, *supra* note 9, at 846. See also Smith, *supra* note 155, at 621-22.

274. Specifically, Smith stated: "The relationship of emotional stimuli to grave physical injury and to diagnosable disease seems to involve a weak link previously present. The mechanism of injury here usually involves aggravation of a pre-existing impairment with the factor of individual idiosyncrasy or susceptibility playing the dominant role." Hubert Winston Smith, *Relations of Emotions to Injury and Disease: Legal Liability for Psychic Stimuli*, 30 VA. L. REV. 193, 225-26 (1944).

275. *Id.* at 296; see Chamallas & Kerber, *supra* note 9, at 847-48.

caused by an emotional stimulus and resulting in some physical disorder is to be regarded with skepticism.²⁷⁶

Another writer with legal and medical qualifications is John Havard, whose article, *Reasonable Foresight of Nervous Shock*, appeared in 1956.²⁷⁷ In that article, Havard explained the physiological bases for the connection between emotions and body, or how emotional shock can produce physical symptoms, through the autonomic nervous system:

[The autonomic nervous system] is the vestige of the primitive nervous system of lower animal life, and gives rise to appreciable subjective physical sensations in healthy persons only in times of crisis. These sensations include frequency in passing water, looseness of the bowels and palpitations, which we have all experienced on certain occasions such as the period before an examination or a football match. These symptoms are harmless in a normal individual and are due to an emotional discharge through the autonomic system. Where, however, some physical predisposition to damage is present, such as arteries narrowed by disease, weakness of the heart wall, or perhaps a pregnant uterus, a moderately severe discharge may cause incapacitating illness or even death. . . . The factor which initiates a discharge through this system is predominately fear, and fear may be of many kinds. It may be fear for one's own personal safety, or for the safety of another; it may be the loss of a loved object, or even an abstract ideal such as honour, reputation, or a political creed. The common denominator of fear is always the threat of loss or damage to something which is highly prized, dearly loved, and to which the person is deeply attached.²⁷⁸

Havard goes on to say that extreme fear is "appropriate, i.e., is normally found," in cases of fear for one's own life,²⁷⁹ presumably because this is where the primeval emotions are justified. The conclusion to be drawn from Smith and Havard's arguments is that the strong version of the zone of danger rule²⁸⁰ is justified by medical science—presence in the zone of danger is an adequate guide to the foreseeability of mental injury.²⁸¹

276. It appears that Smith thought that the very fact that such injury was less likely to occur to men than to women was reason enough to exclude recovery for it. See Chamallas & Kerber, *supra* note 9, at 847-49. It hardly needs to be pointed out that Smith was applying a masculine standard to an injury which was, on his own admission, a feminine one.

277. Havard, *supra* note 6.

278. *Id.* at 481-82.

279. *Id.* at 482.

280. See *supra* text accompanying notes 43-45.

281. See Chamallas & Kerber, *supra* note 9, at 825-26. Havard does go on, however, to note that the law is concerned with "the normal 'man in the street'" rather than "the normal individual of medical standards." Havard, *supra* note 6, at 482. See also *Negligently Inflicted Mental Distress*, *supra* note 36, at 1256 (discussing the

Even if Smith and Havard were correct, and only the particularly vulnerable suffer lasting injury as a result of shock,²⁸² we must ask how this fits in with legal rules applying to existing vulnerabilities in other contexts. The "eggshell skull" rule, as we have seen,²⁸³ holds that once a duty is owed and breached the defendant is liable for all resulting injury, even if that injury is grossly out of proportion to that which would normally be expected from the negligent act and was a result of the plaintiff's particular susceptibility to injury.²⁸⁴ Thus, the rule would suggest that a plaintiff's emotional vulnerability is irrelevant, but the situation is complicated here by what we might call the "transformation difficulty": the vulnerability serves to transform the injury from a non-actionable one (mere shock, grief, or fright) to an actionable one (medically diagnosable psychiatric disorder and/or physical illness). The ramifications of vulnerability extend, therefore, beyond mere quantum of damages to the whole issue of whether the plaintiff has a case. Little attention appears to have been paid to this fact in the cases or the literature, so it is worth going into the question in some depth here.

If the eggshell skull rule is designed to protect the weak, then the "transformation difficulty" should not be a problem. If some injury was foreseeable and a duty was breached, the defendant should be liable under the fundamental restoration principle: damages must be assessed in such a way as to restore the plaintiff to his or her former position.²⁸⁵ However, this principle is in tension with the apprehension of courts that to impose liability in some situations will lead to a greater extent of liability than is justified in view of the wrong the defendant committed.²⁸⁶

difference between medical and legal conceptions of causation). Havard ultimately recommends the application of something akin to the medical standard in the law. Havard, *supra* note 6, at 495-97.

282. *But see* Okrina v. Midwestern Corp., 165 N.W.2d 259, 263 (Minn. 1969); McNiece, *supra* note 30, at 9; *Negligently Inflicted Mental Distress*, *supra* note 36, at 1257 (observing that medical science "is in general agreement that every person possesses some degree of susceptibility to traumatically induced mental distress").

283. *See* KEETON ET AL., *supra* note 33, at 290-92; FLEMING, *supra* note 33, at 183-85. On the added complications involved in applying the rule to mental injury, see McNiece, *supra* note 30, at 68-72.

284. *See Negligently Inflicted Mental Distress*, *supra* note 36, at 1257-58.

285. *See* FLEMING, *supra* note 33, at 206.

286. *See, e.g.,* Molien v. Kaiser Found. Hosp., 616 P.2d 813, 825 (Cal. 1980) (Clark, J., dissenting); Amaya v. Home Ice, Fuel & Supply Co., 379 P.2d 513, 525 (Cal. 1963) (quoting Biakanja v. Irving, 320 P.2d 16); Barnhill v. Davis, 300 N.W.2d 104, 109 (Iowa 1981) (Allbee, J., dissenting); Corso v. Merrill, 406 A.2d 300, 304 (N.H. 1979) (stating that apprehension should not be determinative but should be weighed against plaintiff's injury); *but see id.* at 308 ("liability beyond culpability should not be imposed no matter how great the injury"); Tobin v. Grossman, 249 N.E.2d 419, 423, 425 (N.Y. 1969) (Keating, J., dissenting) (noting that the concern

Thus, it might be said that the restoration principle actually works against plaintiffs: if the restoration principle were relaxed and the disproportionality concern were elevated to the status of a principle of damages assessment, courts would modify the damages award according to the defendant's culpability. Yet courts prefer to deny the plaintiff's claim completely if full compensation is judged to be too great a sanction given the defendant's level of wrongdoing. The approach of completely denying the claim is fundamentally flawed because it obscures the fact that the defendant has committed a legal wrong and the plaintiff is innocent. This approach reflects something of a "blame the victim" mentality which the eggshell skull rule was intended to prevent.

This, however, brings us to the question of whether the plaintiff was in fact a "victim," in the legal sense. The resolution of this issue depends on whether there was a duty of care, which, in turn, depends on whether injury was foreseeable.²⁸⁷ If the plaintiff's vulnerability makes any injury at all unforeseeable, then no duty will be owed. We must then consider exactly what is meant by "injury" in this situation; but the cases developing the concept of duty of care cannot answer that question because they did not anticipate the dilemma of needing to be relatively specific about the type of injury with which one is concerned, and having to decide on the level of generality at which injury will be categorised. One way to resolve the dilemma is to recognize that there is nothing anomalous about founding duty on something broader than the foreseeability

about disproportionate liability was the majority's main reason for rejecting *Dillon* in that case); *Waube v. Warrington*, 258 N.W. 497, 501 (Wis. 1935). See also *KEETON ET AL.*, *supra* note 33, at 361; *Brody*, *supra* note 36, at 232-33. But see *Negligently Inflicted Mental Distress*, *supra* note 36, at 1245-1246, 1262; *Creto*, *supra* note 61, at 65 (suggesting that the apprehension is really an example of "the court's tendency, unconscious or otherwise, to focus almost exclusively on the defendant, with little attention given to the plaintiff's injury").

A related concern is that to allow recovery by "abnormal" plaintiffs would lead to a "flood of trivial claims." See *Negligence and Emotional Harm*, *supra* note 55, at 518. As to the paradox introduced by this concern with the seriousness of the injury, see *supra* note 140. It should be noted that the apprehension just described is just that—an apprehension—and does not have the same status as the restoration principle in damages. Yet it seems to carry more weight in this type of case, with the result that the eggshell skull principle is not applied in the way just suggested.

287. It has, of course, been asserted time and time again that the duty question turns on more than foreseeability. See *supra* note 67 and accompanying text. However, the important point for present purposes is that foreseeability is an essential component of the duty question and, it is submitted, the most important. See *Barnes v. Geiger*, 446 N.E.2d 78, 80 (Mass. Ct. App. 1983); *Dziokonski v. Babineau*, 380 N.E.2d 1295, 1302 (Mass. 1978); *Burris v. Pollack*, 545 N.E.2d 83, 91 (Ohio 1989); *Corso v. Merrill*, 406 A.2d 300, 303 (N.H. 1979); *Sinn v. Burd*, 404 A.2d 672, 686 (Pa. 1975); *D'Ambra v. United States*, 338 A.2d 524, 532-33 (R.I. 1975) (Keller, J., concurring).

of *legal* injury.²⁸⁸ The question will still remain whether the injury in fact suffered is legally cognizable, and those suffering "trivial" or "transient" injuries will still be excluded.

In other words, the reasons for excluding certain types of injury from recovery are different from the reasons for insisting on the foreseeability of injury at the duty stage. The "reasonable man," as he is driving along the street, does not distinguish between the legally cognizable harm he might cause and the "trivial" feelings of grief for which he will not be legally liable.²⁸⁹ He avoids all such injuries, provided he can foresee them, and if he does not, the courts fail to recognize some of them because there are more important things on which precious judicial time can be spent.

The foregoing analysis, trying to separate out notions of injury for the purposes of duty, remoteness, and damages, may appear to be so much hair-splitting, but unfortunately it is necessary in order to get to the bottom of the zone of danger rule and show that the rule is simply a way of preventing a duty from being owed in respect of emotional or mental security.²⁹⁰ Courts applying the rule are trying to have it both ways: refusing to alter their moral assessment of defendants' behaviour and yet paying lip-service to medical knowledge. The net result of the zone of danger rule is that there is a legally cognizable damage for which no duty is owed.

Courts' perceptions of a plaintiff's non-deservingness, particularly his or her oversensitivity, raise the possibility of the application of remoteness or proximate cause rules to disadvantage mental injury plaintiffs. Concerns about disproportionality between liability and fault are fundamentally in tension with the eggshell skull rule. I have suggested a principled way to resolve the tension in favour of those who suffer mental injury as a result of harm to another person, by predicating duty on the foreseeability of any in-

288. Indeed, Lord Atkin's famous dictum in *Donoghue v. Stevenson* posited a duty to those who are "so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected . . ." 1932 App. Cas. 562, 580 (emphasis added). At the risk of relying too heavily on Lord Atkin's famous words, one cannot help but notice that there is no suggestion that a defendant should be able to foresee any damage at all.

289. He may, however, fail to consider the latter injuries at all. See *infra* text accompanying notes 316-17.

290. As Justice Tobriner said in *Dillon v. Legg*, "when we have rejected the impact rule . . . [t]he zone-of-danger concept must . . . collapse because the only reason for the requirement of presence in that zone lies in the fact that one within it will fear the danger of impact." 441 P.2d 911, 915 (Cal. 1968) (emphasis in the original). See also *Creato, supra* note 61, at 61-62. Havard mounts a substantial defence of the zone of danger rule as a duty rule relating to foreseeability. See Havard, *supra* note 6, at 484-85. If his analysis is correct, there is no need to apply anything but the usual rules relating to the plaintiff's pre-existing vulnerability.

jury, legally cognizable or otherwise, and then excluding plaintiffs who have not suffered the required kind of damage. Under this approach, as long as mental injury is legally cognizable and some injury (even physical injury) was foreseeable, it makes no difference that mental injury was not necessarily foreseeable.

In sum, the three stages of the negligence inquiry at which recovery for mental injury has been, or could be, blocked are damage, duty, and remoteness or proximate cause. The policy justifications overtly applied by courts for denying or restricting recovery under the damage question, and either overtly or covertly under the duty question, are suspect in terms of logic and principle, and the rules that courts have developed and applied to mental injury do not, for the most part, effect the policies supposedly underlying them. Even the most permissive approaches to mental injury, such as the Australian "proximity" approach, evidence a continuing unease with mental injury. To the extent that restrictive liability rules are motivated by a perception that mental injury plaintiffs are abnormal, such plaintiffs are likely to encounter problems at the remoteness or proximate cause level, yet the eggshell skull rule dictates that such abnormalities should be disregarded. If the plaintiff's perceived abnormality is taken into account, this is another clear indication that the law has more problems with mental injury than judges have acknowledged in the traditional arguments.

In this Part, I have shown that the various rules which restrict recovery for mental injury occasioned by harm to another are, at the very least, an exception to the general logic of duty and foreseeability in negligence. I have further shown that, to the extent that courts have grappled with issues of remoteness and proximate cause in this area, the suggestion has been that we are facing a general exception to the eggshell skull rule. What are we to conclude from this state of affairs? I would propose the conclusion that judges over the years have felt an instinctive discomfort with this type of claim, and that rather than naming accurately the source of that discomfort they have resorted to spurious arguments such as disproportionality and "floodgates," or built rules on foundations that cannot support them, like triviality and the danger of fraud. It is on the basis of this hypothesis, that the real cause of judicial discomfort with mental injury occasioned by harm to another has not hitherto been named, that I now proceed to suggest that that cause is sexist and patriarchal attitudes.

IV. Feminist Explanations for Judicial Discomfort with Mental Injury

The law's habit of treating mental injury as an exceptional category of damage is not motivated by concerns about fraud, flood-gates, or disproportionality, but by patriarchal thinking. The common law has not only been developed by men, it has been influenced by philosophical notions developed by men, which serve as general justifications for the subordinate position of women in Western society. Attention to the thought of key philosophers such as Descartes, Rousseau, and Hobbes reveals a clear correspondence between the philosophy of patriarchy and the approach of the common law to mental injury occasioned by harm to another. This correspondence may provide explanations for the development of law in this area—explanations which, as discussed in the preceding part, are not provided by the concerns and ideas which courts have purported to have in mind.

The Cartesian notion of the mind-body split has long supported the idea that women are inferior to men.²⁹¹ Here we find that the legal approaches whereby mental and physical injury must be treated differently, and the former treated as inherently unreliable, also appear to be based on the notion of a radical separation between mind and body. This is an example of the kind of consistency between patriarchal thought and the law of mental injury occasioned by harm to another which is to be explained in this part of the article.

Another important idea in Western philosophy—one which has its roots in the classical philosophies of Rousseau and Hobbes and supports numerous institutions in industrial capitalist society—is abstract individualism.²⁹² Once we recognize that abstract individualism has been a powerfully influential idea in the development of Western civilization, we should not be surprised to find that the legal system treats injuries which arise out of connection to others as somehow freakish. It is also worth noting that abstract individualism has been heavily criticized by feminist scholars as a notion of humanity which fails to account for the distinctive experience of women. In this sense, institutions founded on abstract individualism marginalize women; and the law, it will be argued here, is no exception.

Feminist critiques of abstract individualism's marginalization of women are an example of a broader thrust in feminist theory of

291. See *infra* part IV.A.

292. See *infra* part IV.B.

identifying situations where men are treated as the standard whereby all human beings are judged and women, to the extent that they are observably different from men, are treated as an exception or an aberration.²⁹³ These situations are often referred to as the imposition of an "implicit male norm," and they often place impossible burdens on women, or otherwise disadvantage them, for example by patronizing them. Numerous other examples of implicit male norms can be found in the law relating to mental injury occasioned by harm to another. Courts at various points have introduced such norms in the way they have used female stereotypes to deny or limit liability, tended to be more generous in cases involving mental injury suffered by a rescuer, developed the standard of the reasonable man as applied in the duty inquiry, and placed economic considerations at a premium in the recognition and assessment of damages. To the extent that any of these tendencies can explain the apparent inconsistency and doctrinal incoherence of the law in the area of mental injury occasioned by harm to another, we can conclude that the law is informed more by sexist and patriarchal attitudes than by principle or sound analysis.

Another common tactic used in a patriarchal society to disadvantage women is the application of double standards.²⁹⁴ It is argued that this area of law is no exception because, with a hypocrisy that is characteristic of a patriarchal institution, it fails to value the feminine attributes which sustain the emotional life of our society and which are taught to and expected of women.

A. Patriarchal Epistemology and the Mind-Body Split

Mental injury plaintiffs are disadvantaged by patriarchal epistemology—the way that knowledge is formed, or believed to be formed, in a male-dominated society. Traditional beliefs about the formation of knowledge and methods for distinguishing "true" knowledge from "mere" belief or superstition are not value-neutral, and certainly not gender-neutral. Yet the law is riddled with loaded assumptions about knowledge, and these assumptions disadvantage mental injury plaintiffs.

French philosopher Rene Descartes is commonly acknowledged as the father of Western rationalism.²⁹⁵ His famous aphorism, "I think, therefore I am," means that we can be sure of our

293. See *infra* part IV.C.

294. See *infra* part IV.D.

295. See Jane Flax, *Political Philosophy and the Patriarchal Unconscious: A Psychoanalytic Perspective on Epistemology and Metaphysics*, in *DISCOVERING REALITY* 245, 258 (Sandra Harding & Merrill B. Hintikka eds., 1983) (noting that Descartes' philosophy "defined the problematics for much of modern Western philosophy").

existence—or the existence of anything else—only through our faculties of thought and reason.²⁹⁶ Our sensation of being alive is no help, nor is the recognition of our existence by other people.²⁹⁷ The only way of knowing anything, be it the fact that one exists, or anything else, is by separating oneself from that thing.²⁹⁸ Cartesian epistemology depends upon objectivity and rationality; in order to know a thing, we must be able to stand back and observe it. What we *feel* to be true is not to be trusted, for it may be a manifestation of our “passions” rather than of “reason.”

It may come as a surprise to hear this approach to knowledge described as patriarchal; it is commonly understood to be simply correct. Yet Francis Bacon described the appearance of Cartesian epistemology as “a truly masculine birth of time.”²⁹⁹ “Masculine,” according to Susan Bordo, refers to an epistemological stance whose “key term is *detachment*: from the emotional life, from the particularities of time and place, from personal quirks, prejudices, and interests, and most centrally, from the object itself.”³⁰⁰

One implication of this epistemological stance is a radical separation between mind and body.³⁰¹ Our bodies, the loci of our senses and animal drives, are a hindrance to rational, objective thought.³⁰² The ability to transcend the body characterizes a mature human being. As children we are beset by prejudices and assume that our bodies and our physical experiences make up reality: “now, as mature Cartesian doubters, we reverse that prejudice. We assume nothing. We refuse to let our bodies mystify us We begin afresh.”³⁰³ Thus, the separation of the mind and body and

296. *Id.* at 259 (quoting Descartes' statement: “I thereby concluded that I was a substance, of which the whole essence or nature consists in thinking, and which in order to exist, needs no place and depends on no material thing . . .”).

297. Flax sums up Descartes' view of the “self” as follows:

This self needs “no place and depends on no material thing” including . . . other human beings. It is thus completely self-constituting and self-sustaining. The self is created and maintained by thought. This view of the self entails a denial of the body and any interaction between body and self Social relations are not necessary for the development of the self. The self is a static substance.

Id.

298. Jane Flax characterizes Descartes' stance as narcissistic, “in which the outside world is seen purely as a creation of and an object for the self.” *Id.* at 260.

299. Susan Bordo, *The Cartesian Masculinization of Thought*, in *SEX AND SCIENTIFIC INQUIRY*, 247, 258-59 (Susan Harding & Jean F. O'Barr eds., 1987) (quoting FRANCIS BACON, *THE PHILOSOPHY OF FRANCIS BACON*).

300. Bordo, *supra* note 299, at 259.

301. See *supra* note 297 (discussing the Cartesian view of the “self”).

302. See Bordo, *supra* note 299, at 256-58.

303. *Id.* at 258. A similar theme can be seen in Plato. See Flax, *supra* note 295, at 255-58 (discussing the connection between Plato's devaluation of the body and his devaluation of women).

the superiority of the mind over the body are basic tenets of Cartesian epistemology.

One of the many implications for feminism of the idea of transcending the body³⁰⁴ is the effect of such an epistemology on the ability of courts to recognize mental injury. It might seem ironic that a culture that emphasizes the importance of the mind does not consider mental injury far more serious than injury to the body. However, the "mind" affected by mental injury does not correspond with Descartes' rational, thinking, understanding mind; it is what Descartes would think of as the emotions, or the senses, which are irrational, prerational, or arational, and hence associated with the body.³⁰⁵ It would be unthinkable, under the Cartesian mind-body split, that injury to the emotions could lead to injury to the mind, or if it does, the person suffering the injury would be perceived as not a fully mature human being because of his inability to transcend the body.

It is easy to see how this approach can lead to the belief that a mental injury plaintiff is in fact the author of his or her own injury, or at least to serious confusion about the nature of the injury. Requirements tying injury to physical phenomena, such as the impact rule, the zone of danger rule, the *Dillon* criteria, and the physical manifestation rule begin to make sense as products of an inability to come to terms with the relationship among the mind, the body, and the emotions.³⁰⁶ In addition, advances in the medical profession's understanding of such relationships have to a large extent informed the progressive liberalization of recovery rules for mental injury.³⁰⁷

304. These include the apparent association of women with things other than what is valued and the failure to account for women's experiences. See *infra* notes 315-19 and accompanying text.

305. Bordo, *supra* note 299, at 256-59.

306. Chamallas and Kerber note that this is a clear example of the way the law uses men as the standard for assessing the value of injuries. Chamallas & Kerber, *supra* note 9, at 864.

307. See *Molien v. Kaiser Found. Hosp.*, 616 P.2d 813, 817 (Cal. 1980); *Falzone v. Busch*, 214 A.2d 12, 14 (N.J. 1965); *Sinn v. Burd*, 404 A.2d 672, 678-79 (Pa. 1975); *Robb v. Pennsylvania R.R.*, 210 A.2d 709, 712 (Del. 1965). See also Chamallas & Kerber, *supra* note 9, at 847; Goodhart, *supra* note 52, at 15; Havard, *supra* note 6, at 480 (to "confront the medical evidence with an impossible task of apportionment [between physical and mental injury] would be discreditable to any system of jurisprudence"); *Expanding the Concept of Recovery*, *supra* note 155, at 184-186 (suggesting that it is artificial to distinguish between mental and physical damage).

It has been suggested that the state of science "in the field of traumatic neurosis . . . probably always will be primitive" because reactions to trauma vary so widely, depending on what the individual was like before being exposed to the trauma. Sidley, *supra* note 252, at 198-199. See also McNiece, *supra* note 30, at 74. However, it must be remembered that the law is satisfied with a lower level of certainty of causation than would satisfy a scientist.

Indeed, the very fact of reliance on medical evidence³⁰⁸—for example, to establish the genuineness of claims—is illuminated by Cartesianism. According to Cartesian epistemology, scientific knowledge is the only reliable knowledge³⁰⁹ because it is (supposedly) based on objective observation.³¹⁰ Medical evidence is scientific and thus reliable. The focus on scientific rationality explains the law's reliance on medicine, be it to support specific rules, to recognize mental injury as sounding in damages, or to evidence causation or satisfy requirements relating to the seriousness of the injury in individual cases.³¹¹

An example of reliance on medical evidence to support specific rules is the way courts have relied on the work of medico-legal writers such as Smith and Havard to support the zone of danger rule.³¹² One must always bear in mind that even medical science develops from a point of view, and that point of view is by and large male; Havard's examples of the examination and the football match³¹³ speak deeply of the male orientation of his thought.³¹⁴ Havard's most glaring omission is that his analysis, while purporting to be based on primeval emotions, apparently fails to recognize the possibility that there is something primeval about protecting one's young. If there is such a primeval drive, it is clearly of special significance to women, and so the failure to acknowledge even the possibility of its existence is very convenient from a patriarchal point of view. This example shows the danger of treating medical

308. See, e.g., *Page v. Smith*, [1995] 2 All E.R. 736, 752 (Lord Browne-Wilkinson). *But cf. id.* at 759 (Lord Lloyd of Berwick) (suggesting that advances in medical science may mean that "it would not be sensible to commit the law to a distinction between physical and psychiatric injury").

309. "Any knowledge not built on the foundations of mathematics is like the 'moral writings of the ancient pagans, the most proud and magnificent palaces, built on nothing but sand and mud.'" Flax, *supra* note 295, at 259 (quoting RENE DESCARTES, DISCOURSE ON METHOD). It has been suggested that "emphasis on physical tests [in this area of law] is related to the nineteenth-century desire to equate the law with the physical sciences." Goodhart, *supra* note 52, at 23.

310. Feminists have questioned even this. See generally FEMINIST APPROACHES TO SCIENCE (Ruth Bleier ed., 1986).

311. See *supra* notes 155-56 and accompanying text.

312. See *supra* text accompanying notes 273-81.

313. See *supra* text accompanying note 278. It must be remembered that at the time Havard was writing, education was still by and large a male preserve.

314. That orientation is also apparent in Smith's work. Chamallas and Kerber comment: "Smith deployed Freudian-sounding arguments to discredit claims of women (and some men) who did not measure up to his conception of normality . . . Smith's medicalized notions of normality disadvantaged women." Chamallas & Kerber, *supra* note 9, at 847.

opinion as any more reliable and unbiased than other sources of knowledge.³¹⁵

The influence of Cartesian epistemology is also evident in judicial opinions that view the onset of mental injury after the death or injury of a loved one as an unnatural reaction which is not a part of common human experience.³¹⁶ Such observations show an obvious insensitivity to women's reality in this society; indeed, a judge who was fully attuned to that reality might well disbelieve any woman who claimed not to have been severely distressed by such an event, especially if she witnessed it.³¹⁷ How would such an attitude be formed? Not through detached, objective observation, but either through the judge's own lived experience as a woman or, if the judge were a man, a suspension of objectivity and a conscious effort to empathize with women. In stark contrast to Cartesian approaches, feminism teaches that such lived experiences are the basis for knowledge and, as Catharine MacKinnon explains, the method of transforming experience into knowledge is consciousness-raising:³¹⁸

Women are presumed able to have access to society and its structure because they live in it and have been formed by it, not in spite of those facts. Women can know society because consciousness is part of it, not because of any capacity to stand outside it or oneself. . . . Knowledge is neither a copy nor a mis-

315. The example in the text is in the same category as the central insight of Carol Gilligan's work on moral development that the most influential researcher in the field to date had based his work on observations of an exclusively male sample. See generally GILLIGAN, *supra* note 12. A "science" which is developed without attention being paid to women can be expected to be hopelessly biased against women—yet the practice has not traditionally disqualified the knowledge gained from description as "scientific."

316. See, e.g., *Waube v. Warrington*, 258 N.W. 497, 501 (Wis. 1935); *Chester v. Waverley Corp.*, 62 C.L.R. 1, 10 (Austl. 1939). See also Chamallas & Kerber, *supra* note 9, at 828-29 (discussing *Spade v. Lynn & Boston R.R.*, 47 N.E. 88 (Mass. 1897) and commenting that "[t]he image that emerges . . . is one of a hypersensitive plaintiff whose claims pose a threat to business-as-usual"). Chamallas and Kerber go on to suggest that the decision in *Amaya v. Home Ice, Fuel & Supply Co.*, 379 P.2d 513 (Cal. 1963) (denying recovery to a bystander mother) was informed by an assumption of the plaintiff's abnormality. Chamallas & Kerber, *supra* note 9, at 854. See also *Negligently Inflicted Mental Distress*, *supra* note 36, at 1257. Such observations are also obvious instances of the application of an implicit male norm. See *infra* notes 322-23 and accompanying text.

317. There are, however, examples in the cases and the literature of sensitivity to this aspect of the position of mothers. See, e.g., *Dillon v. Legg*, 441 P.2d 911, 917 (Cal. 1968); *Blackwell v. Oser*, 436 So. 2d 1293, 1297 (La. Ct. App. 1983); *Johnson v. Jamaica Hosp.*, 467 N.Y.S.2d 634, 636, 638 (App. Div. 1983) (note, however, that this was a "direct victim" case in a state that still adheres to the zone of danger rule); *Goodhart*, *supra* note 52, at 25; *Stone*, *supra* note 126, at 788; *Negligently Inflicted Mental Distress*, *supra* note 36, at 1258-59.

318. CATHERINE MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE*, ch. 5 (1989).

copy of reality, neither representative nor misrepresentative as the scientific model would have it, but a response to living in it. Truth is in a sense a collective experience of truth, in which "knowledge" is assimilated to consciousness, a consciousness that exists as a reality in the world, not merely in the head.³¹⁹

Consciousness-raising is important to feminist theory because it suggests that objectivity is not necessarily the best, and certainly not the only, stance from which knowledge can be gleaned. It also exposes the ways in which the "objective" stance of science perpetuates its own power.³²⁰ In this way, it poses a challenge to the methodological foundations of patriarchy.

It is no coincidence that Descartes was writing at a time which saw a massive onslaught of the subjugation of women. It has been noted that the Enlightenment, while commonly hailed as a golden age in the blossoming of science and human intelligence, was also a time when men's need to control women became even more urgent than ever, the results including witch hunts and the male takeover of birthing.³²¹ This is not to say that everyone who has ever mistreated a woman did so on the basis that "Descartes told me to," but that Descartes' philosophy has been very influential in shaping modern Western thought (particularly the ascendancy of science as "truth"). Many of the arguments used today to justify the subordination of women (particularly biological ones) derive more or less directly from it. Moreover, because the influence of Descartes is particularly pronounced in the area of our understanding of ourselves and the way we know things, general attitudes that work to the detriment of women can also be traced back to him.

It might therefore be suggested that a feminist legal system, meaning one which took women's concerns seriously, would not need to look to medical evidence or physical phenomena to be convinced of the reality of mental injury. Simply from looking at the facts, and understanding the position of the plaintiff, a feminist legal system would conclude that the loss of a loved one, especially of a son or daughter,³²² can and does change one's life in a very

319. *Id.* at 98.

320. *See id.* at 99-101.

321. *See Bordo, supra* note 299, at 261 (characterizing "the years between 1550 and 1650 as a particularly gynophobic century"); Flax, *supra* note 295, at 260 ("The self which is created and constituted by an act of thought is driven to master nature [read: women], because ultimately the self cannot deny its material qualities. . . . The desire to know is inextricably intermeshed with the desire to dominate.").

322. There is a Chinese blessing: "I hope that your grandfather dies, I hope that your father dies, I hope that you die, I hope that your son dies, I hope that your grandson dies." While this might sound like anything but a blessing, it encapsulates the idea that everyone dies, but the main thing is that it should happen in the right order: it is hard to imagine anything more devastating than the untimely death of a

serious way. This conclusion simply flows from a recognition of the fundamental human³²³ experience of connection with other people, one of the most important messages of feminism in the 1980s.³²⁴

If, on the other hand, the legal system is influenced by the idea that full humanity is achieved through detaching the mind from the body, it will necessarily have difficulty recognizing injury resulting from the interaction of the mind and the body. It is likely to regard such injury as unforeseeable, or simply non-existent. It is also likely to see people who suffer mental injury as feeble and worthless—the kind of people who do not deserve society's protection through the legal system—and suspect them of lying. It cannot be mere coincidence that all of these attitudes are evident in mental injury cases that apply restrictive rules.³²⁵

If the legal system is further influenced by the idea that reliable knowledge is gained only through detached observation, it is bound to rely on medical evidence in assessing the reality and reasonableness of the injury, rather than on common experience. Once again, the common law has done just this, first by relying on advances in medical science to protect the interest in freedom from mental injury and then by requiring medical testimony to prove causation and/or the seriousness of the injury. It must therefore be concluded that the common law has been shaped by the fundamentally patriarchal thought of Descartes, which values those aspects of human experience which are commonly identified with men (ra-

child or grandchild. Thus, the Court of Appeals of New York was fundamentally wrong when it attempted to dismiss this kind of grief as "the risk of living and bearing children." *Tobin v. Grossman*, 249 N.E.2d 419, 424 (N.Y. 1969).

323. Although it is often said that "connection" is an important part of the *female* experience, it is described here as part of the *human* experience because it is my belief that men experience it too; the difference is only that women are encouraged to experience and cultivate it whereas men are discouraged from the same. This is not to say that recognition of the importance of connection is not an important step in recognizing *women's* concerns—simply that to do so will be liberating for men as well. On women's connection experience, see Robin West, *Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN'S L.J. 81 (1987). On men's connection experience, see remarks of Carol Gilligan in DuBois et al., *Feminist Discourse, Moral Values, and the Law—A Conversation*, 34 BUFFALO L. REV. 11, 47-49 (1985). See also GILLIGAN, *supra* note 12, at 17 ("men in mid-life [are now celebrating the discovery] of the importance of intimacy, relationships, and care").

324. See, e.g., GILLIGAN, *supra* note 12; DuBois et al., *supra* note 323; Kenneth Karst, *Woman's Constitution*, 1984 DUKE L.J. 447; Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39 (1985); Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543 (1986); Bender, *supra* note 1; Paul J. Spiegelman, *Integrating Doctrine, Theory and Practice in the Law School Curriculum: The Logic of Jake's Ladder in the Context of Amy's Web*, 38 J. LEGAL EDUC. 243 (1988).

325. See *supra* part I.E.

tional thought over emotions) and relies heavily on objectivity and separation of the self from others.

B. Abstract Individualism

In addition to the tradition of valuing the "rational" mind over the body and emotions, there is a very strong tradition in Western philosophy of regarding human beings as fundamentally separate from each other. The very idea of Cartesian "objectivity" involves notions of separation and individuation: "The result [of becoming a mature Cartesian doubter] is a securing of all the boundaries that, in childhood, are so fragile: between the 'inner' and the 'outer,' between the subjective and the objective, *between self and world*."³²⁶ Thus, it would appear that a person for whom those boundaries remain indistinct is really only a child, and/or not fully human. Such a person could certainly not be trusted truly to know or understand the world, or, indeed, him- or herself.³²⁷

The idea of human beings as individuals before all else reached its heyday with the emergence of liberal philosophy. In contrast to the mediaeval view of the universe as an organic whole,³²⁸ each person and each institution having its place and function, the seventeenth and eighteenth centuries saw the ascendancy of the idea that each person is his or her³²⁹ own universe. Thus, in the "state of nature" made famous by Hobbes, Locke, and Rousseau, human beings were fundamentally solitary, self-sufficient, and independent³³⁰ and it was only by the establishment of

326. Bordo, *supra* note 299, at 258 (emphasis added). Bordo suggests that the Cartesian fear of and desire to control women (and nature) can be explained as the result of a "drama of parturition"; the process of separation and individuation from the mother is such a painful one that it gives rise to an ongoing anxiety about one's separateness from others. *Id.* at 252. This anxiety could be assuaged by "an imagery of the cosmos" where we are all interconnected, with each other and with the universe at large, but Descartes prefers a more radical break that is chosen and "therefore experienced as autonomy rather than helplessness." *Id.* at 253-55, 259. It has also been suggested that the very idea of transcendence of the body is informed by one's relationship with one's mother, in that hers is the first body from which we "escape." See Flax, *supra* note 295, at 257-58. If these suggestions are true, or even partly true, they could go a long way towards explaining the relationship between Cartesian philosophy and patriarchy, for women do not feel separateness from their mothers so acutely as do men. See NANCY CHODOROW, *THE REPRODUCTION OF MOTHERING: PSYCHOANALYSIS AND THE SOCIOLOGY OF GENDER* 167 (1978). See also GILLIGAN, *supra* note 12, at 46-47 (discussing Freud's position on mothers and sons).

327. It is therefore highly significant that one of the major insights of modern feminist scholarship is that women are just such people. See *infra* text accompanying notes 342-48.

328. See Bordo, *supra* note 299, at 251-55.

329. But probably "his." See *infra* text following note 354.

330. See Flax, *supra* note 295, at 265 ("Even childbearing gave rise only to brief, utilitarian relations between mother and child.").

private property, the division of labour, and the nuclear family that the state of "civil society" was reached.³³¹ On this view, most if not all major trends and movements in human history—wars, revolutions, industrialization, technological development—can be seen as predominantly motivated by longing for that blissful former state of autonomy.³³²

Thus, liberal philosophy concludes that the individual's desires are paramount, being prior to social structures, and thus prior to the position of the individual in society.³³³ "Logically if not empirically, human individuals could exist outside a social context; their essential characteristics, their needs and interests, their capacities and desires, are given independently of their social context and are not created or even fundamentally altered by that context."³³⁴ Moreover, the "metaphysical assumption of abstract individualism" means that "each human individual has desires, interests, etc., that in principle can be fulfilled quite separately from the desires and interests of other people."³³⁵

This concept of atomistic individualism is not just a practical philosophy³³⁶ but a world view—a set of assumptions about the reality of human nature. It sees humanity as a series of atoms, which may form itself into a collection of atoms, if that is perceived to be in the interest of the individual atoms. However, if self-interest is the only reason for the formation of social groups and the construction of connections between the atoms,³³⁷ the atoms are still the basic unit of humanity.

How might such a world view affect legal reasoning in the area of mental injury occasioned by the death of or by injury to an-

331. *Id.* at 265-66.

332. Note, however, that Rousseau did not see fit to include the (patriarchal) nuclear family as an institution to be questioned, and this in spite of the fact that it entails such a huge sacrifice of women's "natural" independence and autonomy. *Id.* at 266. The nuclear family was necessitated by private property, as men had to be sure that their heirs were legitimate, but no explanation is offered for the fact that the property belonged to men rather than women. *See id.* at 265-68.

333. Liberal philosophy also rested on the "metaphysical dualism" of the mind-body split. *See* ALISON M. JAGGAR, *FEMINIST POLITICS AND HUMAN NATURE* 28 (1983).

334. *Id.* at 29.

335. *Id.* at 30.

336. The instrumentality of liberal philosophy in establishing and justifying capitalism is clear. The only way individuals can be satisfied is by individual endeavour, and so private enterprise becomes a good in itself.

337. Jaggar notes that not all liberal philosophers subscribe to the "thesis of universal egoism." JAGGAR, *supra* note 333, at 31. However, all such philosophers would probably agree in this context on the importance of "rational self-interest" for the establishment and perpetuation of social groupings.

other?³³⁸ This type of injury is bound to raise conceptual difficulties for one who sees human beings as fundamentally separate. One who sees social relationships as acts of free will, rather than a fundamental part of the human condition, would find it difficult to understand that injury to one person can cause injury to another. If relationships are acts of free will, it might be said that the injury was also a result of the plaintiff's own choice.

We can see the influence of this kind of thinking in many of the rules applied to emotional injury. The impact rule, for example, can be understood on the basis of an assumption of egoism: if the defendant does not hit me but someone else, that is none of my business.³³⁹ Or consider this interpretation of the zone of danger rule: it is only my own endangerment which creates a duty to me; the breach of a duty to anyone else is a private matter between those two people.³⁴⁰ Even the *Dillon* guidelines, requiring as they do some personal involvement in the accident causing the physical injury to the third person, stop short of recognizing the importance of the relationship itself.³⁴¹ Even though the closeness of the relationship is one of the criteria, I cannot recover unless there has been some impact on *my* senses. The simple knowledge that someone I love has been killed or injured is not recognized as something that might change my life.

Thus, challenges to liberal individualism inevitably also challenge restrictive rules relating to recovery for mental injury, and such challenges abound in feminist literature. Indeed, the fundamental feminist critique of liberal individualism is that it does not account for women's experience of life as connection. First, as Robin West points out, the biological experience of being female generates the experience of feeling generally connected to others,

338. Again, it is not claimed that liberal philosophy has had any express, or even any direct, impact on the development of tort law. This analysis is based on an educated guess that the world view propounded by liberalism has such a hold on the minds of most people in the United States, Britain and Australia (especially on those of the social class from which judges are most likely to come) that it cannot help but filter into all institutions, including the courts. Prosser and Keeton have noted the influence of "the highly individualistic philosophy of the older common law" in withholding recognition of duties of positive action. KEETON ET AL., *supra* note 33, at 373.

339. See *supra* part I.B.

340. It has already been noted that the ultimate import of the zone of danger rule is that no duty is owed in respect to mental injury as such. See *supra* text accompanying notes 57-58 and accompanying text. A very clear possible explanation for this is the failure to recognize relationships and the possible consequences of their disruption.

341. See *supra* notes 84-85 and accompanying text.

especially to one's offspring.³⁴² Menstruation is a monthly reminder of one's childbearing potential. Heterosexual intercourse is a similar reminder, in that it can lead to pregnancy, and is furthermore an "invasive and 'connecting' experience" in itself.³⁴³ Pregnancy is probably the clearest example of women's connective experience.³⁴⁴ Lactation, or the creation inside one's own body of food for another person, is also a clear example of a fundamental connection between two people, and is experienced uniquely by women.³⁴⁵ However, these biological explanations do not fully explain the common association of females with connectivity, given that that association extends to, and indeed can be observed in, females who have never had any of the above experiences.³⁴⁶

342. Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988). That is, it is the biological and reproductive aspects of femaleness that account in the greatest part for women's feelings of connection to others. *Id.* at 2-3, 14.

343. It might be asked, if this is the case, whether heterosexual intercourse is also a connective experience for men. Not being a man, I cannot answer this, but it is suggested that differences in male and female anatomy make it less likely. The penis, being a visible presence, has a beginning and an end, but the vagina is both an absence and a presence. It is "This Sex[ual Organ] Which Is Not One"—neither one nor none, but possibly "two lips which embrace continually." Luce Irigaray, *This Sex Which Is Not One*, in *NEW FRENCH FEMINISMS* 100 (Marks & de Courtivron eds., Claudia Reeder trans., 1981). (I would have chosen the words "kiss each other" over "embrace," as this is a more accurate translation of the French "s'embrasser." The original, *Ce sexe qui n'en est pas un*, was published in a volume of the same name in 1977). The fact that these lips allow of penetration make it difficult to say, in a purely logical sense, exactly where a woman's body begins and ends.

It may further be wondered why West's analysis overlooks same-sex intercourse. The most obvious response is that same-sex intercourse is not implicated in reproduction, but West does seem to suggest that penetration in itself blurs ego boundaries. For completeness, then, it should be noted that not all sexual intercourse between men and women involves penetration, and that some same-sex intercourse (both between men and between women) does involve penetration. These observations do not, however, detract from West's central thesis, in that the vast majority of women do experience penetration in intercourse at some point in their lives and the vast majority of men do not.

344. Indeed, the very debate over abortion is, formally at least, a result of the inability of our usual ways of understanding the status of people in relation to one another to answer the question whether a fetus is part of the woman carrying it or a separate person in its own right.

345. Again, it might be expected that the experience of being breast fed would lead all children, male and female, to experience a connection with their mothers. This may well be true, and further support for the notion that all human beings experience the world in a connected way. On the other hand, accounts by psychologists of what comes after breast feeding suggest that the experience is very different for boys and girls, in ways that would explain the subsequent apparent lack of connectivity in men. See generally CHODOROW, *supra* note 326.

346. The fact that not all women experience any or all of these biological functions does not, in my view, detract from the force of West's analysis; the fact remains that the vast majority of women do experience at least one of the functions West mentions, and that even those who do not experience any or all of them are likely to have at least expected, at some stage in their lives, to experience one or more of them. This expectation in itself can give rise to a "sense of connection"; West explains how

The most famous example of this observation is Carol Gilligan's book, *In a Different Voice*.³⁴⁷ In it, she identifies an ethic of caring and connection which seems to characterize women's moral development from an early age. Gilligan notes that words like "responsibility" seem to have different meanings in the feminine and masculine vocabularies. The "feminine voice" speaks of a world where people are all fundamentally connected, and thus have responsibility for each other. Its approach to the settlement of disputes is to emphasize caring and the preservation of relationships, whereas the "masculine voice" sees people as fundamentally separate, and attempts to resolve conflicts between them on the basis of a hierarchy of rights.³⁴⁸

Carol Gilligan's work has captured a great deal of attention for two reasons. First, in spite of the fact that it has been much criticized,³⁴⁹ it identifies something many women (including myself) had always felt to be true, and thus validates the caring, connective approach we have taken in our lives and with which we have perhaps, as feminists, struggled. It speaks to the dissatisfaction many of us felt about the "equality" approach to women's rights, which appeared to mean that we had to become the same as men, leaving behind large and, we suspected, valuable parts of ourselves.³⁵⁰ Sec-

such a sense of connection itself can lead to "a way of learning, a path of moral development, an aesthetic sense, and a view of the world and of one's place within it which sharply contrasts with men's." West, *supra* note 342, at 15. In other words, biological experiences—and the expectation of those experiences—can have far-ranging and very subtle social and psychological effects.

347. *Supra* note 12.

348. GILLIGAN, *supra* note 12, at 25-39.

349. Some of the strongest criticism of Gilligan's *In a Different Voice* has been on methodological grounds. See, e.g., Cynthia F. Epstein, *Faulty Framework: Consequences of the Difference Model for Women in the Law*, 35 N.Y.L. SCH. L. REV. 309, 319-20 (1990) (arguing that Gilligan's generalizations about men and women were drawn from an inadequate sample size and only three studies). See also generally John Broughton, *Women's Rationality and Men's Virtues: A Critique of Gender Dualism in Gilligan's Theory of Moral Development*, 50 SOC. RES. 597 (1983); Debra Nails, *Social Scientific Sexism: Gilligan's Mismeasure of Man*, 50 SOC. RES. 643 (1983); Catherine G. Greeno & Eleanor E. Maccoby, *How Different is the Different Voice?*, 11 SIGNS 304 (1986); Zella Luria, *A Methodological Critique*, 11 SIGNS 316 (1986); CAROL TAVRIS, *THE MISMEASURE OF WOMAN* 79-90 (1992); Gertrude Nunner-Winkler, *Two Moralities? A Critical Discussion of an Ethic of Care and Responsibility Versus an Ethic of Rights and Justice*, in *AN ETHIC OF CARE: FEMINIST AND INTERDISCIPLINARY PERSPECTIVES* (Mary J. Larrabee ed., 1993). For Gilligan's response to her critics, see DuBois et al., *supra* note 323; Carol Gilligan, *Reply by Carol Gilligan*, 11 SIGNS 324 (1986); Carol Gilligan, *Moral Orientation and Moral Development*, in *WOMEN AND MORAL THEORY* 10 (Eva F. Kittay & Diana T. Meters eds., 1987).

350. Much of the feminist literature on women and the legal profession, for example, focuses on the unsatisfactory nature of the demands the legal profession makes that women become more like men. See, e.g., Menkel-Meadow, *supra* note 324; Rand Jack & Dana Crowley Jack, *Women Lawyers: Archetype and Alternatives*, 57 *FORDHAM L. REV.* 933 (1989).

ond, Gilligan's work raises a number of important questions that remain at the heart of feminist theory today: How can we ensure respect for our differences in a world where difference means inequality? How can we assert demands for full humanity in spite of our differences from men without lending support to the essentialist claims about our differences that got us here in the first place? How can we make people understand the complexities of the relationship between difference and equality?³⁵¹

One answer is to recognize that the problem is not one of difference or equality, but one of power and domination. In other words, the root cause of women's oppression is not inequality in spite of sameness, or (substantive) differences in spite of (formal) equality, but the overwhelming power men wield over us, which silences us, makes us blame ourselves for our problems, and thus perpetuates itself. It is for this reason that radical feminists such as Catharine MacKinnon are wary of reliance on Gilligan's work, arguing that the morality she identifies is not a "different voice" but "morality in a higher register," the morality of those who have been valued according to their ability to be caring and fulfill other traditional roles.³⁵² The feminist struggle, according to MacKinnon, should focus instead on those institutions and practices which perpetuate male power and silence women.³⁵³

Problematic though Gilligan's work may be, it does say something about women that is probably true in some sense, and it has clearly been clearly instrumental in formulating the fundamental feminist insight that liberal "human" nature is not female nature—so either women are not human, or liberalism is wrong in its assumptions. A broader claim may also be made: that *all* people, male *and* female, are fundamentally social beings, that it is our

351. One very good example of the way that insistence on differences between women and men can backfire is the case of EEOC v. Sears Roebuck & Co., 839 F.2d 302 (7th Cir. 1988), where a large retailing company successfully argued that the underrepresentation of women in its commission sales positions was a result not of discrimination, but of women's different preferences. See Jacqueline D. Hall, *Women's History Goes to Trial: EEOC v. Sears, Roebuck and Company*, 11 SIGNS 751 (1986). Joan Scott has suggested that the way out of such a bind is to recognize that difference and equality are not mutually exclusive, but mutually interdependent. The very idea of equality rests on a recognition of difference—otherwise there would be no need to talk about it. See Joan W. Scott, *Deconstructing Equality-Versus-Difference: Or, The Uses of Post-Structuralist Theory for Feminism*, 14 FEMINIST STUD. 33, 46 (1988). See also Chamallas & Kerber, *supra* note 9, at 862-63.

352. CATHARINE MACKINNON, *FEMINISM UNMODIFIED* 39 (1987). See also remarks by MacKinnon in DuBois et al., *supra* note 323, at 27 (asserting that the "different voice" is "the voice of the victim speaking without consciousness").

353. The silencing power of pornography, for example, is the core of MacKinnon's critique of that practice. See CATHARINE MACKINNON, *Francis Biddle's Sister: Pornography, Civil Rights and Speech*, in MACKINNON, *supra* note 352, at 163-97.

ability to love and to form significant connections with others that makes us human, and, perhaps more significantly, that connection cannot be avoided for that very reason. Thus liberal individualism may be wrong in relation to *all* people, although this is most clearly perceived by women. A legal system determined to take women's concerns seriously would recognize the importance of relationships in a way that has not been done in any of the jurisdictions under consideration in this article. It should not say, "Well, women should not be that way because they are only perpetuating their own misery, so we will go ahead and act as if they were not that way." Such an approach is in fact a violation of the principle that tortfeasors should take their victims as they find them.

A legal system that took the concerns of women seriously would not be immediately suspicious of injury arising out of connections among the plaintiff and other people. Of course, some women value connection more than others, and some men no doubt value connection more than some women. However, the generalization can be made that women, by and large, experience life as connection and are encouraged to value connection. Restrictive liability rules relating to mental injury arising out of harm to another person have been informed by a vision of human nature that does not take the experiences and values of women into account. Both the impact rule and the zone of danger rule treat plaintiffs who are injured by fear for another person as either abnormal or unforeseeable. The *Dillon* approach, while recognizing the importance of relationships, really only differs from the older rules in that it requires a lesser degree of directness in the relationship between the defendant and the plaintiff. It recognizes mental injury only to the extent that it is caused by some impact on the plaintiff's physical senses, and stops short of recognizing that the disruption of a relationship may be a devastating thing.

C. *Implicit Male Norms*

When I was working on a early draft of this article, I was asked, in a casual conversation, to explain its subject. When I did so, my (male) interlocutor's reaction was to ask, "But don't you think women are more sensitive to that kind of thing?" I could not disagree; indeed, it is part of the purpose of this article to argue just that. My response, however, was to ask another question: "More sensitive than whom?" There is a difference between saying that the fact that an injury has a disproportionate impact on women appears to lead courts to take it less seriously, and saying that they are right in doing so. My interlocutor's question, prefaced as it was

by "but," was really suggesting the latter. What he was in fact saying was that the fact that there is a disparity between the sexes means (or should mean) that whatever women are is *excessively* [fill-in-the-blank]. (Or, if the disparity makes women less [fill-in-the-blank] than men, we are automatically *insufficiently* [fill-in-the-blank]). I could not have asked for a clearer example of an implicit male norm.³⁵⁴

This is the fundamental problem of modern feminism: the fact that men are consistently used as the standard and women are consistently seen as a deviation from that standard. Traditional Western philosophy is ridden with assumptions about humanity that are based on its authors' experience as male, especially insofar as it sees detachment and discontinuity between people as "the central fact of human experience." We have already seen that this idea, clearly present in the thought of Descartes, is a masculine one. Hobbes also saw human beings as fundamentally separate and thus failed to account for women's experience in childbearing and child-rearing. The qualities required by such tasks were simply not seen as part of the "human condition." It is clear that either a cause or an effect (or probably both) of these positions is the devaluation of women. In short, a third angle from which the law of mental injury may be subjected to feminist analysis is that of the idea of an implicit male norm.

1. Triviality and Economics

The use of a male standard explains the legal system's difficulties with valuing injuries suffered by women, or injuries to "feminine" interests. First, mental injury cases are riddled with the use of female stereotypes to exclude recovery, especially when courts rely on the triviality argument to support failure to recognize mental injury³⁵⁵ or requirements relating to the seriousness of the injury. Second, there is a structural bias against women built into the system of damages assessment generally, which is put in relief in the area of mental injury. This bias comes about as a result of

354. In fairness to my interlocutor, I should note that he took my point when I launched into a tirade about implicit male norms. He then proceeded to argue that women freely choose to value relationships and that disparities in power between men and women are the result of that free choice, thus providing me with an excellent illustration of another of my major points of feminist analysis: abstract individualism. See *supra* part IV.B. Another very good example of an implicit male norm is the attitude that treats pregnancy as an abnormal state. For a discussion of how this attitude has influenced the development of the law of mental injury, see Chamallas & Kerber, *supra* note 9, at 834-35, 847-48.

355. See *supra* text accompanying notes 141-44.

the common law's habit of concentrating on the economic aspects of injuries.

The argument that mental injury is essentially trivial has at its base an assumption that any seriousness the injury might hold derives from the plaintiff's inability to control his or her emotions. This assumption bears a striking similarity to the stereotype of women as overemotional.

There is no contradiction between the assertion that women's overemotionality is a stereotype and the argument that women *are* more attuned to the emotions than men.³⁵⁶ The point is not that women are more emotional than men, but that we are, by and large, more concerned than men with connection. Greater concern with connection may entail a greater emphasis on the emotions. Stating the proposition in terms of emotionality, however, automatically raises negative connotations of irrationality. Of course, emotions are in one sense irrational by definition,³⁵⁷ but if by irrational we mean unreasonable, or incomprehensible, or not fully human, the word certainly does not describe emotions. In any event, even assuming that women are more emotional than men, that "fact" does not necessarily mean that we are *too* emotional, unless men are to be the standard by which we are judged. The problem with the stereotype, then, is not that it is descriptively false, but that it imports a judgment and an implicit male norm. Once such injury is valued and taken seriously, it is difficult to imagine courts relying on the specious arguments described above³⁵⁸ for excluding or restricting recovery.

The assumption that mental injury is trivial may also be at least partly explained by the way the law privileges economic over non-economic injury. This privileging amounts to a structural bias³⁵⁹ against women for two reasons. First, the characterization of loss as "economic" appears to be made on the basis of male values, because it disadvantages those who do not work outside the home (mostly women). Second, the privileging of economic losses is a structural bias against mental injury and leads to the conclusion that such injury is trivial. This conclusion, in turn, leads to restrictive rules that fail to recognize the importance of the interest to be

356. See *supra* notes 316-21 and accompanying text.

357. That is, emotions are by definition not subject to control by the faculties of thought and reason.

358. See *supra* part I.E.

359. Chamallas and Kerber define "structural bias" to mean a situation where something which is disfavoured (generally) is more likely to apply to a certain group. Thus, if mental injury is disfavoured and more likely to be suffered by women, there is a structural bias against women. Chamallas & Kerber, *supra* note 9, at 845.

protected. Yet history suggests that the courts have, and are likely to continue to have, difficulty recognizing the devastating effects mental injury can have on an individual because the injury is not "economic" in the sense that word is commonly understood in the common law. The common law of negligence, having grown in response to the massive increase in workplace accidents in the nineteenth century, displays a tendency to emphasize the strictly economic aspects of accidents. Though damages for pain and suffering, and other "intangible" losses, make up a large proportion of damages awards in most personal injury actions, the emphasis is still on lost wages and earning capacity. Thus, the system automatically favours those whose earning capacity is relatively great,³⁶⁰ which means that it automatically disfavours women.

It might be asked why this is such a bad thing, if it means that everyone is put back in his or her former position. The system is, after all, concerned with compensation rather than redistribution. It is not the place of a compensation system to attempt to achieve economic justice. The problem with such observations is that the same injury has the same impact on a person, whether he or she is rich or poor. The pain is the same; the sense of having been wronged is the same. Yet damages awards for pain and suffering appear to be a function of awards for lost earning capacity.

Moreover, even though damages are theoretically assessed according to earning *capacity*, assessment of that capacity will unavoidably depend in large part on the plaintiff's actual earnings at the time of the accident. Women generally are more likely than men to be temporarily out of the workforce at any given time, and a mother who has witnessed an injury to her son or daughter is even more likely to have been out of the paid workforce at the time of the injury. For such a woman, an injury will not affect her income, so she will suffer in the lost earning capacity part of the award as well as the pain and suffering component. Moreover, the common law has become quite confused when faced with the issue of awarding damages for loss of capacity to work in the home.³⁶¹

More fundamentally, mental injury itself is likely to be seen as non-economic in nature. It is common for an individual to be absent

360. See Richard Abel, *Torts*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 189-190 (David Kairys ed., 1982).

361. The difficulty lies in conceptualizing a way of compensating domestic workers for loss of their working capacity. The loss has variously been characterized as a loss to the plaintiff's family rather than herself, or as loss of enjoyment of life rather than loss of capacity to perform an economic function. See Lucinda Finley, *A Break in the Silence: Including Women's Issues in a Torts Course*, 1 *YALE J.L. & FEMINISM* 41, 53 (1989).

from work for the duration of a physical injury or illness, but mental or emotional states are not accorded the same status. Thus, mental injury would be seen as non-economic *by its very nature*. If economic injuries are privileged in personal injury actions, it is easy to see how the conclusion could be reached that mental injury is "trivial," even if there is strong evidence that the injury profoundly affected the plaintiff's earning capacity.

An assumption that mental injury is essentially non-economic and therefore trivial could begin to explain the lingering restrictions on recovery for mental injury. Insistence on physical manifestation³⁶² or psychiatric diagnosis clearly shows that the injury is not regarded as "serious" unless it has economic consequences. The physical manifestation requirement transforms the mental injury into a physical one, which brings it back into the fold of easily recognized losses. In a sense, the requirement is a built-in guarantee that the loss will be economic, in the sense that the law understands that term.

The psychiatric diagnosability requirement, while preferable to one of a physical manifestation,³⁶³ defers to medicine a judgment that should be made by the law. The doctor's evidence amounts to a "medical certificate" that the plaintiff is unfit for work. Evidence of a plaintiff's inability to work, of course, is highly relevant to the assessment of damages, but here it is being used instead as a *threshold* requirement, in the sense that without the medical certificate, no cause of action is stated. This is inappropriate, because injury may be profound and deserving of compensation even though it is not "economic." A plaintiff should at least have the opportunity to show that his or her injury fits the description of profound and deserving of compensation, even if it is not economic in the usual sense.

Much may be said for the importance of keeping trivial claims out of the courts, but nothing suggests that the line between trivial and non-trivial should be drawn according to whether the injury is mental or physical. It is far too late to say now that mental injury is automatically trivial and physical injury is automatically serious. If the concern is triviality, the test should be triviality. The psychiatric diagnosability requirement is preferable to the physical manifestation requirement for this reason: that is, it is closely related to the gravity of the injury. However, it is possible to imagine tests even more finely attuned to the question of triviality.

362. See *supra* notes 105-07 and accompanying text.

363. See *supra* text accompanying notes 108-10.

The preoccupation of most common lawyers with economic aspects of injuries is evident in the suggestion that damages should be available only for out-of-pocket expenses arising out of mental injury. Professor Richard S. Miller identifies proportionality of liability to culpability as the major concern in this area of the law³⁶⁴ and suggests that a limitation of damages to "tangible losses"³⁶⁵ would "make the punishment fit the crime."³⁶⁶ It has been suggested above that the proportionality argument is rather a weak one;³⁶⁷ even if that analysis fails, there is no justification in applying the proportionality argument only to mental injury. If the concern is proportionality, the test should be proportionality. Drawing broad distinctions like that between mental and physical injury is bound to work injustice in some cases, because such distinctions increase the likelihood of tests unrelated to the policy they attempt to effectuate. A preferable approach would recognize an injury's seriousness on the basis of the importance of the interest with which the tort interfered, and the degree of the interference. If an interest in the lives and health of those we love is recognized as fundamental and worthy of protection, triviality concerns would not, indeed could not, arise, except to the extent that they apply to *all* injury, mental or physical.

2. Reasonable Foresight

Another way to exclude recovery for mental injury is by the application of a foreseeability analysis, either at the remoteness stage or at the duty stage of the negligence inquiry. Whenever the idea of foreseeability is introduced, we must ask, "Whose foreseeability?" The answer, inevitably, is, "A man's foreseeability." Thus a seemingly intractable male norm permeates the law of negligence.

As we have seen, the Australian case of *Rowe v. McCartney* excluded recovery by a mentally injured plaintiff at the remoteness stage on the basis that her guilt at the defendant's injuries was irrational and therefore unforeseeable.³⁶⁸ This finding of unforeseeability shows the court's failure to recognize that mental injury is in some sense by its very nature irrational, or perhaps arational. That does not make it any less serious or any less devastating than "rational" injury. Nor does it make it any less foreseeable. The major-

364. Miller, *supra* note 64, at 19-20, 32, 34 (dismissing concerns over fraud and floodgates).

365. *Id.* at 39.

366. This aphorism, drawn from Gilbert and Sullivan's *The Mikado*, appears in the title of Miller's article.

367. See *supra* notes 173-80 and accompanying text.

368. [1976] 2 N.S.W.R. 72. See *supra* text accompanying notes 131-34.

ity's decision in *Rowe* completely overlooks the fact that women are trained to, and often do, blame themselves for injuries to others; self-reproach is a (perhaps unfortunate) by-product of the ethic of caring, which is part of the feminine condition in this society.³⁶⁹ The plaintiff in *Rowe* was indeed "responsible" for the defendant's injuries, in the feminine moral sense,³⁷⁰ although not in the legal sense, and so it may be said that her guilt was not irrational at all. Its foreseeability, apparently, depends on who you are, and specifically on whether you look at it from a masculine or a feminine point of view.

The problem of implicit male norms is especially apparent in the standard of the "reasonable man," the "man on the Clapham Omnibus," the "man who takes the magazines at home and in the evening pushes the lawn mower in his shirtsleeves."³⁷¹ As Professor Lucinda Finley comments: "These definitions refer to distinctly male prototypes—the man who works outside the home, legally governs the home, and participates in running the home only with regard to physical maintenance activities using machinery."³⁷² What exactly are the magazines that this man reads? Does he think about the interconnectedness of all human beings as he pushes the lawn mower? If Carol Gilligan is correct, he is less likely to focus on connectedness than his wife, mother or sister. Thus, this formerly explicit and now generally implicit³⁷³ male norm could serve to exclude recovery for mental injury occasioned by the death of or by injury to another person. The reasonable man does not think, as he is driving down the street, about the families of the people he might injure if he drives negligently. Since he does not "have them in contemplation as being . . . affected when [he is] directing [his] mind to the acts or omissions which are called in question,"³⁷⁴ no one else need do so, either.

369. See GILLIGAN, *supra* note 12, at 17, 30. Part of this ethic is the avoidance of harm to others, which can extend to a responsibility to prevent others from harming themselves. *Id.* at 50.

370. See GILLIGAN, *supra* note 12, at 21-22, 37-38 (explaining that, "[t]o Jake, responsibility means not doing what he wants because he is thinking of others; to Amy, it means doing what others are counting on her to do regardless of what she herself wants"); West, *supra* note 342, at 16-17.

371. Finley, *supra* note 361, at 58.

372. *Id.* See also Bender, *supra* note 1, at 20-25 (discussing the inherent male-ness of the "reasonable man" standard and suggesting that an implicit male norm remains even when the standard is changed to that of the "reasonable person").

373. Bender notes that most courts and commentators now use the term "reasonable person." See Bender, *supra* note 1, at 21-22.

374. *Donoghue v. Stevenson*, 1932 App. Cas. 562, 580 (appeal taken from Scot.).

On this analysis, it is easy to see why in many jurisdictions³⁷⁵ no duty is owed in respect of mental injury occasioned by the death of or by injury to a third person: not only is the injury unforeseeable, the plaintiff is as well. The use of a male norm in the context of foreseeability raises different problems from those raised by the use of a male norm in the context of recognition of injury. Recognition of mental injury as sounding in damages is really a question of determining a "reasonable plaintiff," since the underlying attitude seems to be that the unreasonableness of the injury makes its recognition inadvisable. Recognition of the injury obviates any need to be concerned with the reasonableness of the plaintiff. Once we are into the realm of the reasonable defendant, however, the problem becomes much more complicated, because it can be solved only by finding another standard.

Whatever standard is adopted must somehow recognize the importance of connection without being too unrealistic in its expectations of male defendants. It is tempting simply to say that from now on the reasonable man is a reasonable person who recognizes the importance of relationships—thinks about the fundamental interconnectedness of all humans as he pushes the lawn mower—but there is a flaw in that standard if it is descriptively untrue. As much as its results would be desirable, it would amount to feminist imperialism, or to an explicit female norm.³⁷⁶

However, a view of human (or male) nature as recognizing the fundamental importance of relationships is not necessarily descriptively untrue. As Gilligan herself has recognized, men have significant feelings of connection with others.³⁷⁷ Moreover, events in this century have led us back to something more like a pre-liberal world view. Growing awareness of the destruction of the environment, for example, is awareness of our connection to and dependence on the earth, although such an awareness is in tension with classical liberal values of freedom of choice and absence of responsibility for

375. These include those still applying the impact rule, *see supra* note 36, and those applying the zone of danger rule, *see supra* note 42.

376. The idea of the "reasonable woman" was the subject of humorous treatment in the fictitious case of *Fardell v. Potts* in A.P. Herbert's *Uncommon Law* discussed in Bender, *supra* note 1. The judge in that case concluded that there is no such thing as a "reasonable woman." *Id.* at 21-22 n.71 (quoting ALAN P. HERBERT, *UNCOMMON LAW* 1, 5-6 (8th ed. 1969)). Christine A. Littleton has commented that "[m]uch of the humour [of the case] apparently lies in the decision's plausibility." Christine A. Littleton, *Feminist Jurisprudence: The Difference Method Makes*, 41 STAN. L. REV. 751, 767 n.79 (1989). It is indeed no news that the quality of "reasonableness" has traditionally been associated with the male gender. *See* SUSAN MOLLER OKIN, *WOMEN IN WESTERN POLITICAL THOUGHT* 99 (1979); Bender, *supra* note 1, at 22-25; Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 805 (1989).

377. *See* remarks of Carol Gilligan in DuBois et al., *supra* note 323.

others, and poses a challenge to those values. Another example is growing concern with international human rights, since atrocities committed against Jews, homosexuals, communists, and gypsies under the German Third Reich shocked the conscience of the world. It is not liberal individualism that underlies that conscience. It is a recognition that we are all part of the same human family: an atrocity committed against someone I have not even met can be an atrocity *against me*, as a fellow human being.

Thus, it can be argued that the fundamental interconnectedness of all human beings does occur to the reasonable person, or even to the reasonable man, at least from time to time. If this is true, it is not such a great step to require defendants to have in mind the relatives of those whom they can physically endanger. The implicit male norm contained in rules relating to a duty of care in respect of mental injury is one of a *masculine type*, to which not all or even most men conform in practice. The fact that women may be, on the whole, more concerned than men with relationships³⁷⁸ does not mean that men are, on the whole, totally unconcerned with relationships. A standard of reasonableness, then, which recognized the importance of relationships, would move towards a *general human* standard, without imposing unrealistic expectations on those who have been taught to value relationships less than others.

In any event, it can be argued that tort law should have some proscriptive function. If part of its goal is the deterrence of undesirable behaviour,³⁷⁹ there is nothing new about proscribing standards of conduct that are considered undesirable. On this view, the standard is set by reference to an ideal; indeed, it could be said that the reasonable man (or, more recently, person) always has been an ideal, rather than a descriptive reality.³⁸⁰ To hold that a duty of care is owed in respect of mental injury, entailing as it does the judgment that it is reasonable to recognize the importance of relationships, is permissible even if the *average* man or person does not in fact share that recognition. A legal system that was determined to take women's concerns seriously would hold defendants to the standard described.

3. Heroism and Rescue

Another clear example of the application of a male norm in the area of mental injury occasioned by the sight or fact of injury to a

378. See *supra* text accompanying notes 347-48.

379. See *supra* notes 175-78 and accompanying text.

380. See FLEMING, *supra* note 33, at 97-98; KEETON ET AL., *supra* note 33, at 174-75 (observing that the reasonable man "never has existed on land or sea").

loved one is provided by what I will call the "rescue cases." In these cases, the plaintiff did not necessarily know the third person prior to the accident, but suffered shock as a result of being involved in an attempt to save or assist that person. The apparent ease with which courts allow recovery in these cases suggests the application of yet another male norm, one which rewards male virtues.

It is well known that the law wishes to encourage rescuers; in fact, at times, the duty of care owed to the rescuee has been extended to the rescuer.³⁸¹ Yet an analogous policy does not appear to apply to mental injury occasioned by the death of or by injury to a loved one. In short, the law appears to favour mental injury occasioned by involvement in a rescue over that occasioned by the death of or by injury to a loved one.³⁸² There is something rather strange about this contrast, especially where close limitations, relating to the relationship between the plaintiff and the third person, are placed on recovery for mental injury.

In *Barnes v. Geiger*³⁸³ the Massachusetts Appellate Court commented: "To the degree that [*Dziokonski v. Babineau*³⁸⁴] established a limitation of close familial relationship to set in motion the psychic trauma-physical damage sequence, that limitation would effectively be undone by acknowledging as actionable allegations of an undefined intent to rescue."³⁸⁵ In other words, in a context where the law has determined that family members should be

381. Beginning with California in 1959, every state in the United States has enacted some form of "good samaritan" statute as a means of encouraging people to assist others in emergency situations. See generally Mitchell McInnes, *Good Samaritan Statutes: A Summary and Analysis*, 26 B.C. L. REV. 239 (1992). In general, such statutes exempt persons who render emergency care to others from civil liability, except in cases of gross negligence or wanton misconduct. See, e.g., GA. CODE ANN. § 51-1-29 (1981). Although originally aimed at persons providing medical care, many good samaritan statutes have been broadened to cover a wider range of persons. See, e.g., N.Y. GEN. MUN. LAW § 205-b (McKinney Supp. 1995) (law enforcement officials); ILL. ANN. STAT. ch. 225, para. 60/31 (Smith-Hurd 1993) (personnel at free medical clinics); GA. CODE ANN. § 26-2-374(b) (1981) (persons assisting someone who is choking).

382. See Goodhart, *supra* note 44, at 350 (discussing *Haynes v. Harwood*, [1935] 1 K.B. 146); McNiece, *supra* note 30, at 6-7 (discussing *Pugh v. London, B. & S.C. Ry.* [1896] 2 Q.B. 248).

383. 446 N.E.2d 78 (Mass. Ct. App. 1983).

384. 380 N.E.2d 1295 (Mass. 1978). This was the case where the zone of danger rule was rejected in Massachusetts, and its place taken by something similar to the *Dillon* criteria. See *supra* note 62 and accompanying text.

385. 446 N.E.2d at 82. A similar observation was made by the Court of Appeals of New York in *Lafferty v. Manhasset Medical Ctr. Hosp.*, 429 N.E.2d 789 (N.Y. 1981), where the plaintiff had witnessed the effect on her mother-in-law of a mismatched blood transfusion, and participated in the events following the transfusion. New York being a zone of danger state, the court rejected the argument that an exception existed in relation to rescuers.

favoured, it makes no immediate sense to favour unrelated rescuers.

The *Barnes* court's observation related to a plaintiff's alleged intent to rescue, but could be extended to actual involvement in a rescue. If the rationale for relationship limitations is one of foreseeability,³⁸⁶ it is difficult to see how a rescuer's mental injury satisfies this criterion any better than that of a bystander who witnessed the injury but was too timid, or for some other reason unable, to become involved in a rescue. Moreover, it is difficult to see how rescue is any more foreseeable than the fact that the injured person is loved by someone else.

The terms in which courts have spoken about rescuers suggest that recognition of rescuers' injury simply arises out of an admiration for heroism. One very good example is the New Jersey case of *Eyrich v. Dam*,³⁸⁷ where two plaintiffs, a husband and wife, had accompanied a small boy, their neighbour, to a circus. They were both very close to the boy, Jay-Jay, having looked after him for the first six months of his life while his father was in hospital; the husband was described as Jay-Jay's "surrogate father," looking on him as "the son he himself had never had."³⁸⁸ (The plaintiffs did, however, have three daughters.) When the child was severely mauled by a leopard, the husband snatched him from the animal's mouth and carried him, bleeding, away from the ring.³⁸⁹ The boy bled to death, and the husband's injuries included cat phobia and olfactory hallucinations.³⁹⁰ The court allowed recovery by Mr. Eyrich, while rejecting recovery by Mrs. Eyrich, commenting:

[W]e are persuaded that defendant's liability to Mr. Eyrich does not at all depend on his alleged bystander role. His role was not that of a passive shocked witness but rather that of a rescuer, making a heroic effort to save the child from a negligently created peril. . . . In doing so, he came poignantly close to saving the child, whose life would have been spared if at that point there had been a trained first-aid person in attendance at the circus. Also in so doing, he subjected himself to the risk of seri-

386. See, e.g., *Jaensch v. Coffey*, 155 C.L.R. 549, 591-592 (Austl. 1984).

387. 473 A.2d 539 (N.J. Super. Ct. App. Div. 1984). Another example is *Mount Isa Mines Ltd. v. Pusey*, 125 C.L.R. 383 (Austl. 1970). This case, an important one for the recognition of mental injury in Australia, involved a male plaintiff who had attempted to assist two co-workers who had been fatally injured in a horrific accident. It effectively overruled *Chester v. Waverley Corp.*, 62 C.L.R. 1 (Austl. 1939), where the plaintiff saw her drowned son dragged from a ditch. See *supra* notes 98-99 and accompanying text. The final express overruling of *Chester* came in *Jaensch v. Coffey*, 155 C.L.R. 549 (Austl. 1984). See *supra* text accompanying notes 97-100.

388. *Eyrich*, 473 A.2d at 541.

389. *Id.*

390. *Id.* at 543.

ous physical injury even though his actual physical injury was minor.³⁹¹

This language creates a strong impression that the judge was treating the husband's injury more seriously than his wife's simply because of his heroism. For example, the word "heroic" would not have been used before "effort" if the court had not considered that aspect of the plaintiff's actions relevant. It was clearly not a question of no longer being a mere bystander because of physical danger (indeed, if the leopard was prone to mauling people, everyone in the tent was in danger), but of *voluntarily* becoming more than a bystander. The fact that the husband recovered and the wife did not was explained directly on the basis of the former's involvement in the rescue.

Significantly, the *Eyrich* court's reasoning was not based on a policy of encouraging rescues. Rather, it was based on the proposition that the rescue itself made the injury, and the injury's seriousness, more foreseeable:

While grief over the death of Jay-Jay is certainly a significant component of his psychological problems, it is obvious that it is not the only component and that his psychological problems would have been very different had he not himself been involved in the circumstances resulting in the boy's death. It defies the most elementary understanding of the way trauma affects the human mind to assert that Eyrich's physical contact with the leopard, his seizing of the wounded child from its mouth and the ultimate failure of his attempted rescue did not constitute an integral and significant part of the entire episode which caused his mental disturbance.³⁹²

It is very difficult to escape the conclusion that the court here saw the husband's claim as simply more deserving than that of the wife, because of his heroism and her timidity. The wife's claim, by contrast, was excluded on the basis of *Dillon*-type criteria previously laid down by the Supreme Court of New Jersey.³⁹³ If she had been related to the child, she would have recovered. The appellate division, being an intermediate court, was unwilling to apply what it considered to be an extension of that case.³⁹⁴

391. *Id.* at 545. The Court also noted the "surprising disingenuousness requiring our disapproval" of the defendants' failure to mention the rescue in their briefs. *Id.* at 541 n.1.

392. *Id.* at 546-47. See also *Lafferty v. Manhasset Medical Ctr. Hosp.*, 429 N.E.2d 789 (N.Y. 1981) (distinguishing actual rescue from intent to rescue, in a case where the plaintiff's mother-in-law was administered a mismatched blood transfusion). The proposition that a rescuer's shock is more foreseeable than that of a relative is rejected by Teff, *supra* note 63, at 110.

393. See *Portee v. Jaffee*, 417 A.2d 521 (N.J. 1980).

394. It did suggest, however, an extension of the relationship criterion to cover "the child's temporary caretaker or custodian" on the ground that injury to a child in

In short, heroism takes one's injury outside the realm of *Dillon*-type criteria and into another category altogether. If one is merely shocked by witnessing a horrifying injury to another person, or on hearing of harm to a member of one's family, one remains subject to (and, apparently, defeated by) the *Dillon* restrictions.

Now, this is all very well if one is trained to be a hero. The development of courage in the face of physical danger is something encouraged in men and generally actively discouraged in women. The games that boys play, for example, have generally been more physically dangerous than those played by girls. The iconography of heroism is fundamentally masculine—war heroes, political heroes, religious heroes, police heroes, cartoon superheroes, cowboys, explorers, the boy with his finger in the dike, were and are, almost without exception, men. In situations of danger, there is a very strong pressure on women to “leave it up to the men” to take care of things—anything else could be seen as an insult to the latter's masculinity. This makes the masculinity of heroism a self-perpetuating phenomenon: women never learn to be heroes, because we rarely have the opportunity. Thus, what might be called the “rescue exception” to restrictive mental injury rules is yet another structural bias against women³⁹⁵ and a clear example of the way that the law rewards masculine but not feminine behaviour and reactions. Masculine behaviour and reactions are apparently more valuable and more worthy than feminine; they are the norm, the standard by which all people are judged.

In sum, there are openings for the application of an implicit male norm throughout the law of tort, and these opportunities have been taken in the context of mental injury in several ways. First, the failure to recognize mental injury on triviality grounds betrays the application of masculine values. Second, the privileging of “economic” injuries, and the way the law defines what is “economic,” is a structural bias against women. Third, the idea of the “reasonable man,” and judgments about what he or she can foresee, ensure that women's perspectives will not be taken into account in the law. Finally, the courts' approach to mental injury occasioned by acts of heroism demonstrates a valuation of masculine behaviour over the feminine ethic of caring.

this situation would foreseeably impose “an excruciating and wrenching burden of guilt.” *Eyrich*, 473 A.2d at 547.

395. See *supra* note 359.

D. Double Standards

An additional problem with the law of mental injury, which can be identified by feminist analysis, is the application of a double standard. This very common patriarchal tactic, which places women in no-win situations and causes us to doubt our own worth, lies at the foundation of the law's approach to mental injury.

There are two types of double standards: those which hold men to a different standard from women where there would not appear to be any relevant distinction between the sexes,³⁹⁶ and those which hold women simultaneously to two mutually contradictory standards. An example of the former is the expectation that men need to, or at least will, "sow their wild oats" before settling down; women, on the other hand, are to "save" ourselves for marriage. There are many examples of double standards of the latter type. Women are expected to be sexy and attractive, yet pure and chaste—virgin and temptress. Another example is where the state disfavours abortion³⁹⁷ and yet gives minimal and/or insufficient support to single mothers. The most important double standard in this context is that women are valued for the way we can hold relationships together³⁹⁸ and yet condemned for being overemotional.

If, on the one hand, our relative emotional wealth is innate, it cannot be helped and therefore we should not be condemned for it. Indeed, the only way we can be disfavoured simply for being who we are is by the application of a male norm. Under a male norm, our disadvantage is that we are not like men, and hence abnormal. If, on the other hand, emphasizing relationships is something we learn to do,³⁹⁹ it must be taught to us for a reason, and that reason must be one which benefits men. There is, therefore, a deep hypocrisy in

396. Okin notes apparent double standards of this type in the thought of Plato and Rousseau. The former clearly believes that upbringing is more important than nature in forming human character, but justifies the subordinate position of women in terms of their nature. OKIN, *supra* note 376, at 70. Rousseau's views on women "are, unusually, very consciously held and adamantly justified, in spite of the fact that they violate all the major principles of his ethics and social theory." *Id.* at 99.

397. See, e.g., *Wilczyński v. Goodman*, 391 N.E.2d 479 (Ill. App. Ct. 1979), discussed in Barbara L. Bernier, *Mothers as Plaintiffs in Prenatal Tort Cases: Recovery for Physical and Emotional Damages*, 4 HARV. WOMEN'S L.J. 43, 55-56 (1981). The plaintiff in *Wilczyński* was seeking damages for an unsuccessful abortion, but her claim was denied on the ground of public policy against abortion.

398. See *supra* note 349 and accompanying text. See also the observations of Lord Justice Bankes in *Hambrook v. Stokes Bros.*, [1925] 1 K.B. 141 (Eng. C.A. 1924), *supra* notes 46-48 and accompanying text. Bankes clearly valued the woman who thought first of her child more than the one who thought only of herself.

399. It is my belief that this is most likely the dominant explanation. As Leslie Bender says, "[t]here is too much evidence that suggests that gender is socially created . . . to attribute womanliness solely or primarily to biology." Bender, *supra* note 1, at 15.

teaching us to value relationships and then not valuing the injuries received when relationships are disrupted. If women are "more sensitive to that kind of thing," we are that way because society expects it of us. Society, then, should be willing to compensate us when our concern with connection leads to injury.

Conclusion

The common law has a history of imposing restrictive liability rules in the area of mental injury occasioned by the death of or by injury to a third person. Initially, mental injury was not recognized as sounding in damages, unless accompanied by the invasion of some other protected interest, such as personal liberty, physical integrity, or reputation. Courts later limited liability depending on whether the plaintiff had suffered some physical impact in the events that caused the mental injury. The physical impact rule was replaced in most jurisdictions by the "zone of danger" rule, which limited recovery to individuals physically endangered by the defendant's negligence. Finally, something approaching a traditional negligence approach was applied to mental injury, first by the California Supreme Court in *Dillon v. Legg*,⁴⁰⁰ and later by other jurisdictions. Even this approach, however, contains what have turned out to be mechanical tests that tend to decontextualize the problem of recognizing that one person can suffer a mental injury as the result of a physical injury to another person.

The rules developed by courts purport to be prompted by concerns about trivial or fraudulent claims, floods of litigation, and liability which is potentially disproportionate to fault. On closer examination, however, it is clear that none of these arguments is very convincing, and none of the tests really addresses the named concerns in a principled way. Normal tort principles would seem to favour recovery, and yet these principles appear to have been bypassed or distorted.

I have therefore suggested that a structural bias against the feminine may account for the arbitrariness with which the law has approached mental injury. Mental injury can harm men as well as women, but when it comes about as a result of injury to a third person, it is injury to an interest defined as peculiarly feminine: that of caring and relationships. The law has applied a masculine epistemology to claims relating to mental injury. This masculine epistemology has had two effects: first, it has insisted on a mind-body split to differentiate mental from other injuries. Second, it has

400. 441 P.2d 911 (Cal. 1968).

relied on scientific evidence to prove the reality and/or seriousness of the injury, rather than paying attention to the common experiences of women (and men) in this society. The law has also evidenced the influence of liberal ideas of individualism, which never did account for women's experience of connection. It has applied implicit male norms, including a privileging of economic losses over others and of heroism over caring. Finally, an analysis of the law exposes double standards, betraying a deep hypocrisy in society's attitudes to women.

A legal system determined to take seriously the concerns of women would correct all these mistakes by recognizing a fundamental interest in relationships. It would adopt a true reasonable person test, and require this person to foresee the impact of his or her actions on the loved ones of the people endangered by his or her negligent acts. It would automatically take mental injury seriously, and would not require plaintiffs to give extra evidence of its reality. Finally, the rules dealing with any lingering concerns about expansions in liability and the seriousness of the injury would apply to *all* injury, rather than just to mental injury. In this way, an injury more likely to be suffered by women than by men would not be subject to continuing discriminatory treatment.

